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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

ARTHUR "SKIP" CROSS

Petitioner

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY and DIVERSIFIED FOODS, INC.

Respondent

On Petition For Writ of Certiorari
To the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In disability claims governed by ERISA (Employee Retirement Income Security Act),wherein the plan administrator is, by plan terms, afforded discretion, does failure of the administrator to consider, or provide reasons for rejecting, expert opinion constitute abuse of discretion and/or denial of "full and fair review"?

2. Should the deference accorded respondent's decision be reduced because of conflict of interest?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The opinion of the United States District Court appears at Appendix A to the petition and has been designated as unpublished.

The opinion of the United States Court of Appeals appears at Appendix C to the petition and has been designated as unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, As amended ("ERISA") provides in pertinent part:

29 U.S.C. §1132(a)(1)(B)

1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

STATEMENT OF THE CASE

Petitioner was insured under Respondent Diversified Foods and Seasonings, Inc.'s Long Term Disability Plan (hereinafter "Plan"), which is an ERISA plan formed by Diversified Foods and Seasonings, Inc. Petitioner will, unless otherwise noted, refer to the insurer, Reliance Standard Life Insurance Company (hereinafter Reliance Standard), as respondent.

Petitioner apparently filed an abortive claim for long term disability benefits on April 10, 2002 (R.A.-p.222-224) and anticipated filing for Social Security Disability benefits on May 1, 2002 (R.A. p.222), but ambivilated and kept working against medical advice. Even back then, April 3, 2002, his then treating cardiologist, Dr. Carlos M. Sotolongo, felt that he should not work at even a sedentary job (Class 4) and that he should "never" return to full or part time work (R.A.-p.462). On April 18, 2002, Dr. Sotolongo stated that petitioner had "recently been contemplating retirement." He noted that petitioner "had a lot of symptoms of shortness of breath and chest discomfort" and that two weeks prior petitioner "got up to dance and only a minute into the dancing he developed a very severe chest pain which scared him. He has been too scared to do anything since then." Dr. Sotolongo planned conservative treatment, but said, "My recommendation to him is that he retire as I think his work is bringing on a significant amount of stress in his life."(R.A.-p.462)

On February 24, 2003, Dr. Gregory Groglio performed bypass surgery on petitioner (R.A.-p.450). On August 5, 2003 (R.A.-p.275) and October 30, 2003 (R.A.-p.273), petitioner was treated by cardiologist

Barry A. Kusnick for fatigue.

On January 21, 2004, five months before retiring, petitioner underwent a hemodynamic study which indicated blood pressure of 150/93 with high mean arterial pressure and left cardiac work. On February 4, 2004, four months before retiring, an adenosine cardiolite stress test performed that day by Dr. Kusnick was clinically positive for ischemic and scintigraphically abnormal consistent with anterior angina with abnormal wall motion and septal hypokinesis (R.A.-p.282). On March 4, 2004, three months prior to retirement, although Dr. Caren urges that the cardiolite stress test performed that day by Dr. Kusnick was negative for ischemia, it was clinically and electrocardiographically borderline positive for myocardial ischemia with ST segment abnormalities (R.A.-p.284). On April 21, 2004, petitioner considered seeking the same job with another company and began sending out resumes through June 7, 2004 (R.A.-p.109-122).

On June 7, 2004, eighteen days before retiring, petitioner treated with Dr. Kusnick complaining of dyspnea on walking from the front door to the car and fatigue. He complained of severe excess work stress, including a very adversarial supervisor and lots of problems...(undecipherable). His blood pressure was 140/90.(R.A.-p.458) He was to return in 4-6 weeks (R.A.-p.459).

Subsequent to his dialog of June 7 with Dr. Kusnick, by June 10, 2004, petitioner had decided to finally take care of his health and retire. He talked to his employer and obtained and signed a disability claim form (R.A.-p.190) and an attending physician's form ((R.A.-p.469-470).

After advising Dr. Kusnick of his final decision on June 23, Dr. Kusnick sent a letter to respondent, stating:

> Please be advised that Mr. Arthur Cross is now classified as permanently disabled effective immediately. It is my medical opinion, due to Mr. Cross' extensive cardiovascular history as well as his continued physical decline and increase in objective symptoms that Mr. Cross discontinue full or part-time work immediately. Mr. Cross has undergone extensive medical evaluation and treatment which includes 14 heart catheterizations, 2 angioplasty interventions, 3 coronary artery stent placements, an aortic valve replacement in June 1982 and a multi-vessel coronary artery bypass graft open-heart surgery in February 2003. His care has included optimal medication management and an extensive medical rehabilitative regimen. Mr. Cross has reached his maximum medical rehabilitative state. He is on multiple cardiovascular medications which include Zocor, Hyzaar, Coumadin, ASA, Lexapro, Protonix, Foltx, Altace, Restoril, and Benadryl and due to his aortic valve disease/replacement Mr. Cross must maintain a therapeutic anticoagulated state and is followed in our Coumadin clinic weekly. (R.A.-p.457) (emphasis supplied)

Contemporaneously, he executed the attending physician's form, in which he stated that petitioner had "severe" coronary artery disease, aortic valve stenosis, "severe shortness of breath," fatigue, weakness and spondylosis. He also felt petitioner should limit his

standing, sitting, walking and driving to one hour a day each and his bending, squatting, climbing , etc. to "infrequent" occasions (0%-33% of the day). A cardiologist, he felt that petitioner had a Class 3 heart condition (American Heart Association scale). Finally, he stated that petitioner had achieved his "maximum medical rehab state," that he should never return to work and that he was permanently disabled (R.A.-p.469-470).

On June 25, 2004, petitioner's employer executed claim forms indicating that petitioner's occupation could not be modified to accommodate petitioner's disability, nor would offering petitioner assistance resolve the problem (R.A.-p.225-226).

On June 25, 2004 petitioner submitted a claim for disability benefits, terminating his employment as of that date.

On July 8, 2004, respondent executed a form indicating that, based on the claim file, petitioner's case had "been reviewed by a Social Security Specialist" and that it was recommended that petitioner "pursue Social Security Disability Income" benefits (R.A.-p.208).

On July 26, 2004, petitioner treated with Dr. Kusnick and told him he had walked 1 ½ miles in 35 minutes (R.A.-p.267).

On August 4, 2004, Dr. Kusnick wrote to the Benefits Administrator for petitioner's employer to advise her that "Mr. Cross' disability status has not changed nor is it expected to change in the future."(R.A.-p.399) On August 25, 2004, Dorothy McGarry, R.N., B.S.N., C.R.R.N., undertook a medical/vocational review limiting petitioner to sedentary work. (R.A.-p.261)

On September 8, 2004, respondent's Claim Manager, Robert Loy, requested a review from Dr. Marvin Goldstein (R.A.-p.260). In response, Dr. Goldstein found that petitioner could perform a light duty occupation, that there was no apparent cardiac change around June 2004, and that there was no evidence that petitioner "has exceeded his demonstrated physical capacity." (R.A.-p.256)

On September 24, 2004, respondent, Reliance Standard, rejected petitioner's claim for benefits (R.A.-p.75-79).

Petitioner appealed the decision on November 8, 2004, but withdrew the appeal.

On December 7, 2004, petitioner, who had moved to Charlotte, North Carolina, was treated for the first time by cardiologist Dr. Richard M. Jacoby. Dr. Jacoby noted the "Adenosine Cardiolite Stress Test 02/04/04 showing anterior ischemia" with chest tightness on walking about 200-300 feet. He described the stress test as "abnormal" and described petitioner's angina as sounding "fairly severe." (R.A.-p.41-43)

On December 15, 2004, petitioner underwent a 2D-echocardiogram and carotid artery Doppler, the latter of which indicated "high grade left subclavian artery stenosis." (R.A.-p.53-54) On December 23, 2004 petitioner again visited Dr. Jacoby, relating chest discomfort on walking 200 yards. Dr. Jacoby noted that petitioner's exertional angina seemed to have increased slightly. He also proposed that the left subclavian stenosis might be compromising the flow of the LIMA (left internal mammary artery) and suspected (correctly) that a LIMA had been used for the coronary bypass (R.A.-p.39-40).

On February 17, 2005, Dr. Jacoby wrote to Dr.

Peter Le, petitioner's new primary treating physician. He stated (R.A.-p.33) that:

> When walking 30 yards, he becomes dyspneic to the point where he must stop. He is not able to bend over and do work loading his car. He has had some edema in his hands and his feet but more in his hands.
>
> ...
>
> I will review his functional limitations with him at his next visit.

On March 3, 2005, petitioner again saw Dr. Jacoby, who provided a diagnosis, in addition to coronary artery disease, of "chronic congestive heart failure." (R.A.-p.35) Dr. Jacoby also provided a statement of functional limitations, saying (R.A.-p.36):

> I am a cardiologist helping care for Mr. Arthur Cross. He is a 56-year-old male with a complex past medical history including Starr-Edwards aortic valve replacement in 1982 and subsequent coronary bypass February 2003. Ever since around the time of his bypass he has had ongoing problems with dyspnea on exertion which have poorly responded to changes in medication. His past history also includes a known left subclavian artery stenosis which may impair flow to his mammary artery graft as well as nonobstructive coronary stenosis, hyperlipidemia, multiple coronary interventions, Hydrochlorothiazide, obstructive sleep apnea, and TIAs.
>
> Functional limitations currently include dyspnea on exertion requiring cessation of activity with activities of daily living including drying off after taking a shower, taking the

> trash out, [climbing] one flight of stairs, or walking one-half block. These functional limitations would make meaningful employment difficult.

Petitioner refiled his appeal through his then attorney, Edward G. Connette, on March 11, 2005 (R.A.-p.20).

Attorney Connette submitted relevant treatment records to consulting internal medicine specialist William G. Porter, M.D. On March 16, 2005, Dr. Porter issued a report which stated (R.A.-p.9-10):

> . . . I conclude, as have all the cardiologists who have treated him, that Mr. Cross is totally and permanently disabled for any occupation, based on the following medical conditions:
>
> 1. Multi-vessel coronary artery disease that remains symptomatic despite multiple medical and surgical interventions.
> 2. Prosthetic aortic valve with a history of TIAs and CT evidence of multiple cerebral infarcts despite coumadin therapy.
> 3. Uncontrolled hypertension with left ventricular hypertrophy.
> 4. Obstructive sleep apnea. . . .
>
> **A normal graded exercise test is but one factor that should be weighed in analyzing this case. The assessment of prognosis for Mr. Cross's several medical problems requires that the role of job stress, and its known adverse effects on the symptoms and progression of coronary artery disease, be taken into account. This assessment is necessarily more subjective,**

> **but no less important, than the results of an exercise test.**
>
> **It is my opinion that Mr. Cross's physicians have been correct when they advised him to quit work, based on the probability that continued employment, even in a relatively sedentary occupation, would pose considerable medical risk to Mr. Cross. Job-related stress would make his hypertension more difficult to control, which in turn would hasten the progression of his coronary artery disease and increase the risk of more cerebral infarctions and brain damage.** (emphasis supplied)

Finally, not to be outdone, respondent sent some pertinent medical records, **plus a copy of respondent's rationale for denying benefits** (R.A.-p.251), to another consultant, internist and cardiologist Dr. Jeffrey F. Caren. On April 26, 2005, Dr. Caren issued a report (R.A.-p.251-254) stating that petitioner's ability to walk 200 yards indicates Class 2 heart disease. Taken with the stress test of March 4, 2004, he felt that petitioner could perform "light work."

Petitioner's appeal was rejected on June 16, 2005 (R.A.-p.2). **Respondent, in its decisions, provided no reasoning for rejecting the findings of the treating physicians nor of one of their experts, Nurse McGarry.**

Petitioner filed suit in United States District Court for the Eastern District of Louisiana on July 6, 2006. The parties filed cross-motions for summary judgment, and, on April 20, 2007, Judge Lance M. Africk rendered judgment in favor of defendants/appellees Diversified

Foods and Seasonings, Inc. and Reliance Standard Life Insurance Company and against plaintiff/appellant Arthur Cross.

Petitioner then appealed to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the decision of the district court, finding that respondent's determination was not arbitrary and capricious, nor did it fail to provide full and fair review.

REASONS FOR GRANTING THE PETITION

1. In disability claims governed by ERISA (Employee Retirement Income Security Act),wherein the plan administrator is, by plan terms, afforded discretion, does failure of the administrator to consider, or provide reasons for rejecting, expert opinion constitute abuse of discretion and/or denial of "full and fair review"?

There is a conflict between the Circuit Courts as to whether, in disability insurance claims under plans governed by ERISA and according deference to the administrator, arbitrary refusal to credit a claimant's reliable evidence, including the opinions of a treating physician, constitutes "arbitrary and capricious" action and failure to provide "full and fair review."

Five years ago, in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), this Court stated, "Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Since then, the Third, Fourth and Ninth Circuits have held that arbitrary refusal to credit a claimant's reliable evidence, including the opinions of a treating physician, constitutes reversible error. The Sixth Circuit appears to be in agreement, requiring the administrator's

expert to explain his disagreement with the treating physician. But, in the case at bar, the Fifth Circuit has held that, though some treating physician opinions were entirely ignored and others were rejected without specifying cause or, at best, for indefensible reasons, respondent's denial of benefits constituted full and fair review and was not "arbitrary and capricious."

In the Third Circuit, in *Addis v. the Limited Long-Term Disability Program*, 425 F.Supp 2d 610 (E.D. PA 2006), the Court said:

> When the Supreme Court held, in Black & Decker Disability Plan v. Nord, 538 U.S. 822, 829-30, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003), that the rule giving special deference to a treating physician's opinion in Social Security disability cases did not apply to ERISA disability cases, it did not grant plan administrators a license to disregard or only cursorily consider the opinions of the physicians who were familiar with and treated the claimant. The Court concluded that deference may not be warranted when a treating physician had only a short relationship with the patient, or when the plan's retained consultant is a specialist and the treating physician is a general practitioner. Id. at 832, 123 S.Ct. 1965. At the same time, it acknowledged that a treating physician in many cases has a better opportunity to know and observe the patient than do consultants retained by a plan. Id.
>
> Nord did not state that treating

> physicians' opinions are never entitled to deference over retained consultants' opinions. Rather, Nord- instructs that "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician," and that courts may not "impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." Id. at 834, 123 S.Ct. 1965.
>
> The Supreme Court's instruction does not authorize a plan to give conclusive weight to an unreliable report of a nontreating physician. Nor does it insulate plan decisionmakers every time they decide to overrule a treating physician's report in favor of a consultant's opinion. Nord, 538 U.S. at 834, 123 S.Ct. 1965 ("Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician.").

And in the Fourth Circuit in *Stup v. UNUM Life Ins. Co. Of Am.*, 390 F.3d 301 (4th Cir. Md. 2004) the Court said:

> UNUM confuses this substantiality requirement with the "treating physician" rule outlawed in Black & Decker Disability Plan v. Nord, 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003). UNUM argues that the district court

> "erroneously applied" the treating physician rule. The argument is meritless. The district court did not "require" UNUM "to accord special weight to the opinions of [the] claimant's physician," which Nord prohibits. Id. at 1972. Rather, the district court simply concluded that UNUM failed to adhere to the substantiality requirement by arbitrarily disregarding Stup's reliable evidence, including the opinion of her treating physician, relying instead on ambiguous and insubstantial evidence favoring UNUM's own economic self-interest. It is thus UNUM, not Stup, that has failed to follow an instruction of the Nord Court, i.e., that "[p]lan administrators... may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Id.

And, in the Sixth Circuit, in *Kalish v. Liberty Mutual Life,* 419 F.3d 501, 507 (6th Cir. 2005), the Court said:

> [T]he Supreme Court has acknowledged "that physicians repeatedly retained by benefits plans may have an incentive to make a finding of `not disabled' in order to save their employers[']] money and preserve their own consulting arrangements." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (citation and quotation marks

omitted). This court has similarly observed that a plan administrator, in choosing the independent experts who are paid to assess a claim, is operating under a conflict of interest that provides it with a "clear incentive to contract with individuals who were inclined to find in its favor that [a claimant] was not entitled to continued [disability] benefits." Calvert v. Firstar Fin., Inc., 409 F.3d 286, 292 (6th Cir.2005) (noting that the "possible conflict of interest inherent in this situation should be taken into account as a factor in determining whether [a plan administrator's] decision was arbitrary and capricious") (quotation marks omitted). Thus, although "routine deference to the opinion of a claimant's treating physician" is not warranted, we may consider whether "a consultant engaged by a plan may have an `incentive' to make a finding of `not disabled'" as a factor in determining whether the plan administrator acted arbitrarily and capriciously in deciding to credit the opinion of its paid, consulting physician. See Nord, 538 U.S. at 832, 123 S.Ct. 1965.

...

Dr. Conrad, in arriving at a contrary opinion, does not explain why he disagreed with Dr. Rasak's conclusions. See Calvert, 409 F.3d at 296 (finding a reviewing physician's report to be

> inadequate because, even though the reviewing physician "does mention [the claimant's doctors] by name, he does not explain why their conclusions. . . were rejected out-of-hand").
>
> The fact that Dr. Rasak had the opportunity to physically examine Kalish on numerous occasions, while Dr. Conrad relied exclusively on a file review, makes Dr. Conrad's failure to discuss the findings of Dr. Rasak all the more troublesome.

The Ninth Circuit in *Glenn v. Metlife*, 461 F.3d 660 (6th Cir., 2006), in reversing the district court and awarding benefits, said:

> As noted above, the plan administrator need not accord special deference to the opinion of a treating physician. By the same token, it may not arbitrarily repudiate or refuse to consider the opinions of a treating physician. See Black & Decker Disability Plan, 538 U.S. at 834, 123 S.Ct. 1965. In its final rejection of Glenn's claim, however, MetLife did not indicate that it had considered Dr. Patel's letter of February 12, 2003, nor did it provide a reason for rejecting it.3 It also did not indicate whether or not it had considered Dr. Patel's letter of July 22, 2002, which was consistent with the February 12 letter advising that Glenn could not return to work.
>
> In the instant case, it is evident that respondent

relied entirely on the opinions of its hired consultants. In *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), the United States Supreme Court held that the "treating physician" rule, requiring automatic deference to the opinion of a treating physician, did not apply to disability claims under ERISA. While rejecting an automatic rule to that effect, however, the Court by no means granted ERISA plan administrators *carte blanche* to disregard treating physicians' views, saying:

> As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, have greater opportunity to know and observe the patient as an individual. Nor do we question the Court of Appeal's concern that physicians repeatedly retained by benefit plans may have an incentive to make a finding of not disabled in order to save their employers money and to preserve their own consulting arrangements. But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. 538 U.S. at 832 (internal punctuation omitted)

Thus, while the Supreme Court declined to require deference to treating physicians' views in every

case, it clearly indicated that factors such as length of relationship with the patient and relative expertise must be taken into account when determining the weight to accord medical opinions. In that context, the Court's admonition that "[p]lan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician," id. at 834, resonates quite clearly.

The law requires that, because the insurance contract (the plan) provides for deference to respondent's interpretations of fact and law, that deference must be accorded, despite respondent's obvious self-interest, unless it can be shown that their actions indicate that they are not acting as an honest broker.

In this case, Mr. Cross has undergone 14 heart catheterizations, two angioplasty interventions, three coronary artery stent replacements, an aortic valve replacement in June 1982, and a multi-vessel coronary artery bypass graft open-heart surgery in February 2003. His care has included optimal medication management and an extensive medical rehabilitative regimen. (R.A.-p.457)

Three treating cardiologists, one consulting cardiologist and one of respondent's own experts agree that he should not be working at any occupation, particularly a high stress occupation such as his own. (Petitioner had been working against medical advice for a couple of years before finally retiring, not without considerable ambivalence.) Arrayed against them are two consultants whom respondent retained but who never saw petitioner.

Respondent's decisions offer no reasoning for rejecting three of these opinions, not even mentioning

two of them. No specific reasons were given for rejecting the findings of the remaining treating and consulting physicians nor the nurse reviewer. If the denial does obliquely offer such reasoning, it is strained and demonstrably incorrect. Arbitrary failure to credit the opinions of a treating physician or other reliable evidence has been proscribed by this Court *(Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). Obviously, no reason at all cannot constitute good reason.

Petitioner urges that, though the physical activity associated with his occupation is no doubt a malevolent influence, the essential basis for his disability is the stress associated with his position as national sales manager. The findings of the treating cardiologists are that the stress of any employment, much less this position, is dangerous to petitioner's health. These opinions are unrefuted by any medical source, yet they were rejected by respondent.

Petitioner has stipulated that he could have physically performed the requirements of his job on the day after he retired, but only if the effects of such continued work are not a consideration. He simply finally acceded to his physicians' advice that the stress of his occupation was exacerbating his coronary condition.

Presumably, if the reasons given for rejecting a medical opinion are not sufficient, then it has been rejected "arbitrarily." If insufficient reasons render a decision arbitrary, how arbitrary is no reason at all? Petitioner urges that this violation of the clear instructions of the Supreme Court demonstrates "advance(ment of) the conflicting interest of the fiduciary at the expense of the affected beneficiary"

(See *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631 (5th Cir. 10/12/1992; *Vega v. Nat'l Life Insur. Servs.*, 188 F.3d 287 (5th Cir. 1999)) and should constitute failure to provide full and fair review.

Petitioner's claim of disability was strongly supported by petitioner's treating cardiologist, Dr. Kusnick. It is also supported by the findings of petitioner's previous treating cardiologist, Dr. Sotolongo, who recommended petitioner retire years prior.

The Court will find no mention of the name Dorothy V. McGarry R.N., B.S.N., C.R.R.N. in either decision rendered by respondent, nor does it appear in the list of medical records and opinions provided to respondent's consultants, nor did it appear in respondent's brief. Yet, after receipt of the record, including Dr, Kusnick's opinion, respondent submitted the file to Nurse McGarry, who certified that she has "the training and experience in the area of nursing practice encompassed in this review." (R.A.-p.261) Nurse McGarry found that petitioner's R&L (restrictions and limitations) limited him to sedentary, not light, work and that the limitations were "Permanent." Nurse McGarry commented:

> 56 yo with Coronary Artery Disease with history of 14 heart catheterizations, 2 angioplasties, 3 stent procedures and an aortic valve replacement in 2003. Documentation supports claimant continued to work beyond expectations until he became so fatigued he was falling asleep in meetings and short of breath walking in airports. Cardiolyte Adenosine Stress Test March 2004

> demonstrated advanced heart disease. Although claimant exercised to 9.4 mets he had an abnormal adenosine portion which was positive for chest pain and moderate ischemic changes. Based on this information, it appears claimant capable of sedentary restrictions and limitations. Consider vocational outreach.

Respondent, however, made no mention of Nurse McGarry's report and found that petitioner could perform "light," not merely "sedentary," work. Petitioner's past work was at the "light" level of exertion.

As noted, the decision rejects the findings of Dr. Kusnick without stating a reason. In fact, nowhere did respondent even state that a medical opinion had been rejected, much less offer a reason for such rejection. But if reason there be, it is apparently contained in the notation that Dr. Kusnick stated on June 23, 2004 that petitioner was at a "maximum medical rehabilitative state," though petitioner "never participated in the cardiac rehabilitation program following his bypass surgery."(R.A.-p.4) (emphasis supplied)

Petitioner is constrained to ask how respondent knows that this is an inconsistency? What makes respondent think that cardiac rehabilitation can only be achieved through a supervised rehabilitation program? Is it the medical opinion of respondent's adjustor, Ms. Regina Angiolillo, that the walking and exercise regimen Dr. Kusnick prescribed when petitioner's employer refused to approve the supervised program could not achieve the same result? If so, her

signature line fails to identify her credentials as a cardiologist, physician, nurse or medical worker of any kind (R.A.-p.7) that would qualify her to refute the treating cardiologist's statement. Dr. Kusnick considered the walking and exercise regimen to have been "extensive." Apparently petitioner ceased his regimen at a later date and could have then benefitted from reinstitution of rehabilitation. (Around the time of Dr. Kusnick's statement, petitioner was walking 1 ½ miles, but the treatment notes of Dr. Jacoby in 2005 reflect that petitioner "has not been exercising" and that he had chest discomfort at about 200 yards of walking (R.A.-p.37).) There is no medical opinion refuting Dr. Kusnick's statement–none whatever.

Thus, if this notation is intended to constitute the basis for rejecting the findings of Dr. Kusnick, the question, then, is whether:

1. In the absence of any supporting expert opinion;

2. In the absence of ever seeing Mr. Cross, much less at the time of Dr. Kusnick's statement;

3. In the absence of any inquiry as to the nature and extent of the "medical rehabilitative regimen" Dr. Kusnick substituted; and

4. In the absence of any demonstration of expertise on her part;

the opinion of Ms. Angiolillo as to Mr. Cross's "medical rehabilitative state" on June 24, 2004 constitutes sufficiently substantial evidence to reject the entirety of the findings of the primary treating cardiologist. If it is not sufficiently substantial, then the rejection was "arbitrary" and prohibited by *Nord*.

Petitioner urges that, even were respondent afforded full deference, a lay opinion in such a highly

specialized field as cardiology is essentially meaningless, can not conceivably be elevated over that of a treating cardiologist, and cannot constitute "substantial evidence" for rejecting Dr. Kusnick's findings. Moreover, making such a reach in order to attempt to exclude the findings of a supportive physician without a reasonable basis do not reflect the judgment of an unbiased finder of fact. Rather, they further reflect a conflict of interests and demonstrate "advance(ment of) the conflicting interest of the fiduciary at the expense of the affected beneficiary" and should significantly reduce the discretion afforded respondent's interpretations of fact and plan terms.

The decision also rejects the statement of Dr. Porter that "Job-related stress would make (Mr. Cross's) hypertension difficult to control...." Respondent compares petitioner's blood pressure readings on two dates as proof of the surprising proposition that job stress cannot raise one's blood pressure. Petitioner replies that Dr. Porter's statement on the matter has not been refuted by any medical expert, including Dr. Caren, to whom Dr. Porter's report was submitted.

Thus, if Ms. Angiolillo's interpretation of the medical evidence constitutes substantial evidence to support the proposition that job stress cannot raise one's blood pressure, then respondent's rejection of Dr. Jacoby's findings on this matter did not "arbitrarily refuse to credit a claimant's reliable evidence." Otherwise, it did.

As to Dr. Jacoby's finding that Mr. Cross's functional limitations would make "meaningful employment difficult," the decision merely notes the statement (R.A.-p.4) and offers no basis whatever for

rejecting it. In fact, it does not reject Dr. Jacoby's findings. In fact, it does not even mention them again, totally ignoring them.

Dr. Sotolongo's opinion that petitioner was disabled as of April 2002, which respondent and the Court below entirely ignore, is clearly reliable evidence. It was not merely not credited, it was not mentioned.

Again, if insufficient reasons render a decision arbitrary, how arbitrary is no reason at all?

Dictionary.com defines "arbitrary" as "capricious; unreasonable; **unsupported**."(emphasis supplied). The decision's finding that Dr. Kusnick's remarks as to petitioner's conditioning are inconsistent is unsupported. And the finding that job stress cannot increase one's blood pressure is unsupported. Thus, were petitioner to proceed no further, he has shown that the bases for rejection of the findings of these treating physicians are **unsupported**, hence "arbitrary and capricious." But, irrefutably, the decision's rejections of the findings of Dr. Sotolongo, who said that petitioner should retire years before he actually did, of Dr. Jacoby, who said that petitioner's limitations would "make meaningful employment difficult," and of Nurse McGarry, who said, "Documentation supports claimant continued to work beyond expectations" and that he was limited to sedentary work, without any explanation whatever, constitute "arbitrar(y) refus(al) to credit...the opinions of a treating physician" or (for Nurse McGarry) "reliable evidence." This is precisely prohibited by the Supreme Court in *Nord* and clearly renders the decision "arbitrary and capricious," justifying and, petitioner urges, requiring reversal.

The U. S. Supreme Court appears to be

unequivocal in stating that administrators "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." *Nord,supra.* There appears to be no basis for considering these sources to be unreliable. For those whose opinions were not mentioned or for whom no basis at all for rejection was offered, clearly the refusal to credit is arbitrary. For the other, the arbitrariness appears to be equally clear. The Supreme Court said it was not permissible, respondent did it anyway

A. The "common care and prudence rule."

Though petitioner cited to the recently published study of "Job Strain and Risk of Acute Recurrent Coronary Heart Disease Events," *Journal of the American Medical Association*, Vol. 298, No. 14 (October 10, 2007), which is wholly unrelated to physical strain, the Fifth Circuit Court of Appeals declined to distinguish between transient physical stress, such as is measured by a cardiac stress test, and the chronic, emotional stress imposed by employment.

In so doing, the Fifth Circuit failed to consider the "common care and prudence rule,' which was discussed in *Lasser v. Reliance Standard Life Ins. Co.*, 146 F.Supp.2d 619, 624 (N.J., 2001), a case in which respondent offered the same defense–that job stress was not a factor to be considered. The *Lasser* Court held:

> In summary, Dr. Burke's examination of Dr. Lasser involved a treadmill test and other examination techniques calculated to reveal what Dr. Lasser's physical

capacity was at the moment of the examination. Dr. Burke gave it as his professional opinion that "this individual does not demonstrate any cardiovascular disability."

...

[B]y focusing on transient physical capacity, Dr. Burke failed to appreciate the risk to Dr. Lasser posed by occupational stress. Indeed, there is no mention of this issue in Dr. Burke's report. By ignoring the question of occupational stress in relation to Dr. Lasser's cardiac health and what professional duties it is medically reasonable for him to perform, Dr. Burke is at odds with the formidable weight and, indeed, unanimity of the other cardiologists opining on this case.

...

Here is revealed the flaw in Dr. Burke's approach. Dr. Burke believes that if a patient can, at any given moment, perform at a certain level and if risk factors are minimized as much as possible, then other problems, such as...occupational stress, and other factors pointing to a risk of a catastrophic medical event in the future, are "not important" and indeed, not even "germane" to the question of disability. It is obvious even to the lay person that a person might minimize risk factors for a heart attack and yet still be so sick that

engaging in certain activities presents a medically unacceptable danger of future injury or death. This holds true even though, on any given day, that person might engage in such activities with no noticeable ill effect.

...

As will already be clear, the medical evidence overwhelmingly supported the fact that occupational stress posed a serious risk of further deterioration of Dr. Lasser's heart condition and of another heart attack. Speaking generally, Dr. Fields wrote: "[B]oth physical and emotional stress are identified triggers of acute myocardial infarction." Dr. Aldrich said, "[S]tress is a well-documented risk factor not only for the development of coronary artery disease itself, but within that context to the precipitation of a myocardial infarction." Likewise was Dr. Raska:

Stress regardless of exercise tolerance is a recognized independent risk factor for recurrent coronary artery disease.... [T]here are multiple studies in both humans animals and in the laboratory which demonstrate that stress causes flux in the level [of] catecholamines in the circulation which have been shown to be a precipitant of acute myocardial infarction and sudden death.

The doctors were no less emphatic in relating the general proposition to Dr.

Lasser's case. Dr. Lubow wrote, "However, the biggest risk to [Dr. Lasser] is physical and emotional stress that cannot be controlled easily.... **Such stress is accepted by all experts as a significant risk factor in coronary artery disease....**"

In the backdrop of the other doctors' opinions, it is notable that **Dr. Burke's report does not address occupational stress at all. The letter dated April 13, 1999, from Reliance purporting to set forth the reasons for denying Dr. Lasser's administrative appeal also makes no mention of the question of stress nor of its implications for Dr. Lasser.**

...

Finally, the Court cannot accept Walsh's analysis of risk of future harm in relation to present disability under the terms of the disability policy. It is a basic tenet of insurance law that an insured is disabled when the activity in question would aggravate a serious condition affecting the insured's health. (Citing authority) As noted in the Applemans' treatise, "The insured is considered to be ... disabled where it is impossible for him to work without hazarding his health or risking his life." 1C Appleman, *Insurance Law & Practice* § 651 at 241 (1981). In fact, this proposition is sufficiently well-settled that in many jurisdictions it travels under the name of the "**common care and prudence**

rule." E.L. Kellett, Annotation, *Continuation of Work as Affecting Finding of Total or Permanent Disability within Insurance Coverage,* 24 A.L.R.3d 8, § 3(a) (1969)....

Where medical prudence requires a cessation of work activity, the insured is disabled; insurers have failed to convince courts that risk of a heart attack in the future does not constitute a present disability. Pompe v. Continental Cas. Co., 119 F.Supp.2d 1004, 1010 (W.D.Mo.2000) ("[S]uch an approach would force patients with serious health risks to cripple themselves, or even risk death, in order to be considered disabled.... The law is not so harsh.") (citing Herring v. Canada Life Assur. Co., 207 F.3d 1026 (8th Cir.2000)). This is true even though the insured may be capable of physical activity. Honeysucker v. Bowen, 649 F.Supp. 1155, 1162 (N.D.Ill.1986). Clearly the risk of a heart attack may be a disabling factor even though the claimant can sit, stand, or ambulate. *Schlabach,* 469 F.Supp. at 314.

...

Walsh's continued reliance on Dr. Burke's opinion and on the New York Heart Association functional capacity scale is plainly error. Neither authority, as demonstrated, even considers the issue of emotional stress as a risk factor for a heart attack.

In the face of the strongly worded and unanimous opinions of the other cardiologists, Walsh was not free to disregard occupational stress, clearly the primary threat to Dr. Lasser's cardiac well-being.(emphasis supplied)

Petitioner also cites *Herring v. The Canaada Life Assurance Co.*, 207 F.3d 1026 (8th Cir. 2000), in which, as in the case at bar, the defendant had offered no evidence regarding the effects of job stress. The Eighth Circuit reversed because, "There is no evidence to suggest that Herring does not suffer from ...ASHD (arteriosclerotic heart disease);... nor is there any evidence to suggest that Herring's position does not involve a level of stress which could aggravate his condition."

See also *Hoover v. Provident Life & Acc. Ins. Co.*, 290 F.3d 801 (6th Cir. 2002), *Levinson v. Reliance Standard*, 245 F.3d 1321 (11th Cir. 2001) and *Cohen v. Standard Ins. Co.*, 155 F.Supp.2d 346 (E.D. Pa. 2001).

The Fifth Circuit relied heavily upon petitioner's reluctance to retire, especially his inquiry into the availability of similar positions with other employers.

Petitioner understands that **he** decided when he would quit working, and, at the same time that he claimed he could not work for defendant Diversified Foods, Inc., he was looking for a job elsewhere. Moreover, he thought his boss was very demanding. So, if he could not work for the defendant, how could he have worked for somebody else?

The answer is that he could have. Just as he could have, as claimant has stipulated, continued working for Diversified Foods.

It is claimant's call as to when he does stop working. But it is not his call as to when he **should** have stopped working.

Except for heart attacks, cardiac disability is ordinarily gradually progressive. There is no point at which one becomes suddenly disabled. One's treating

physician tells him it has gotten to the point where it is unreasonable to continue working. Some will retire immediately, others will get a bypass and try to work as long as possible, while the ravages of the disease bring progressive weakness, shortness of breath, and chest discomfort and pain. By the time Mr. Cross saw Dr. Jacoby on March 3, 2005, he had progressed to chronic diastolic congestive heart failure (R.A., vol. 2, p. 35), so that, obviously, he waited too long.

So Mr. Cross could control when he retired, but he could not control when he **should** have retired. Respondent would deny his benefits because he tried to get a lesser sales position to pay his rent and groceries. (There cannot be a lot of low pressure Director of National Sales jobs out there.)

Mr. Cross's forma pauperis affidavit is a part of the record. He finally realized that any such job would be stressful and that not one of his doctors advised him to get a less stressful job. They advised him to retire. Dr. Kusnick specifically prohibited even part-time work (R.A., vol. 2, p. 457). Mr. Cross finally retired. He has not worked at any job since he retired on June 25, 2004, and he is living off Social Security Disability Insurance Benefits of $1865 per month (*See* petitioner's forma pauperis petition to the Fifth Circuit Court of Appeals).

If the respondent should have deference, it is over the facts. Procedural requirements are supplied by the sparse regulations of the U.S. Department of Labor and the jurisprudence of the courts.

The contract does not exclude job stress. The respondent is accorded no deference whatever in deciding what etiologies to consider. Thus it cannot say that job stress cannot be considered as a malefactor

in Mr. Cross's cardiac disease.

The unanimous opinion of the physicians who considered the effects of job stress is that claimant should have retired. If respondent wanted to challenge those opinions, they should have. They made no such inquiry whatsoever, neither to the treating physicians nor to their own consultants, regarding the effects of job stress. Their inquiries focused only on claimant's ability to stand, walk, lift and carry.

Thus the findings of petitioner's treating and consulting physicians as to the effects of job stress are entirely unrefuted, or even mentioned. Nevertheless, they were rejected without stated reasons or without even mention.

ERISA claimants in the Fifth Circuit need clarification as to whether the instructions of the Supreme Court in *Nord* are mandatory or merely advisory.

2. Should the deference accorded respondent's decision be reduced because of conflict of interest?

In the case at bar, though respondent has a financial interest in the outcome of their decision, the deference afforded respondent was not diminished.

In his reply brief to the Fifth Circuit, prior to the granting of writs of certiorari by the U.S. Supreme Court in *Glenn*, petitioner stated, "*Glenn v. Metlife*, 461 F.3d 660 (6th Cir., 2006)...while not controlling, is so similar to the case at bar, it is quoted at length." Accordingly, petitioner urges that this matter should be consolidated with that case. Alternatively, this matter should be held in abeyance pending a decision in *Glenn*.

As in *Glenn*, petitioner urges that the discretion afforded respondent should be attenuated, arguably to a point of *de novo* review. *Firestone Tire & Rubber*, 489 U.S. at 115, 109 S.Ct. 948 held,"[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a `facto[r] in determining whether there is an abuse of discretion.'" (internal citation omitted). Discretion was accorded respondent in the plan in the instant case.

The additional bases urged by petitioner for reducing the deference accorded respondent included:

1. Crediting the findings of Dr. Goldstein when his findings were obviously based upon evidence which actually supports a limitation to sedentary work;

2. Compounding the foregoing by stating in its first denial that 1 ½ miles in 35 minutes equates to three miles in one hour;

3. Crediting the findings of Dr. Goldstein and Dr. Cren, when they based their findings on cardiac testing which they inaccurately described as "negative" and which was performed four months before petitioner quit working and crediting Dr. Caren when he admitted that the testing upon which he relied did not apply to petitioner's anatomical condition;

4. Failing to provide the records of Dr. Sotolongo to Dr. Goldstein;

5. Referring to Dr. Kusnick's letter as a letter of advocacy;

6. Advising the consultants of the functional capacity required to deny benefits;

7. Failing to give any consideration to, or to ask their consultants to consider, the effects of stress on petitioner's cardiac condition; and

8. Urging that the possible effects of continued work is not a proper basis for disability.

Petitioner urges that, even had respondent not violated the instructions of *Nord* so that the case rested on the facts alone, no, or very little, deference should be afforded respondent.

Petitioner is aware that writs of certiorari have been granted in *Glenn*, so that, again, petitioner urges that this matter should be consolidated with that case. Failing that, petitioner's argument in support of this contention would be of little value pending this Court's decision in *Glenn*. Should the Supreme Court decision in *Glenn* alter the standard opf review in the instant case, the matter should be remanded and/or reversed.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL BRIAN SPURLOCK
Attorney for Petitioner
DATE: April 2, 2008

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Supreme Court, U.S.
FILED

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No. (2)

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARTHUR "SKIP" CROSS

Petitioner

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY and DIVERSIFIED FOODS, INC.

Respondent

On Petition For Writ of Certiorari
To the Fifth Circuit Court of Appeals

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARTHUR CROSS,	CIVIL ACTION
versus.	No. 06-3507
RELIANCE STANDARD LIFE INSURANCE COMPANY, ET AL.	SECTION "I" /5

ORDER AND REASONS

Before the Court are cross motions for summary judgment filed by plaintiff, Arthur "Skip" Cross, and defendants, Reliance Standard Life Insurance Company ("Reliance") and Diversified Foods, Inc. ("Diversified"). For the following reasons, the Court concludes that defendants' motion for summary judgment should be GRANTED and that plaintiff's motion should be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was hired by Diversified as Director of National Account Sales on January 1, 2001. Effective April 1, 2001, plaintiff was insured through Diversified under a long-term disability plan issued by Reliance. This plan and plaintiff's claims are governed by the Employee Retirement Income Security Act of 1974 ("ERISA").[1] On June 25, 2004, plaintiff terminated his employment with Diversified and submitted a claim for

[1] Rec. Doc. No. 29, P. 1.

disability benefits in connection with a heart condition.[2]

On September 24, 2004, Reliance issued a letter denying plaintiff's application for long term disability benefits.[3] An administrative appeal followed, and on June 16, 2005, Reliance informed plaintiff through his attorney that it had completed its review of the denial of benefits. Reliance stated that, after conducting an independent review of the claim facts and determination, denial of long term disability benefits was appropriate because the claim file information did not support a finding of "total disability."[4] On July 6, 2006, plaintiff filed the present lawsuit.[5]

Plaintiff's Medical Condition

Plaintiff's heart condition dates back to at least 1984, when he had an aortic valve abnormality which required surgery. In the years prior to plaintiff's claimed disability, he occasionally experienced cardiac symptoms and underwent additional catheterization and stenting procedures.[6] On April 3, 2002, Carlos Sotolongo, M.D., plaintiff's then treating physician, noted on an insurance form that plaintiff was never expected to return to full or part-time work.[7] On February 24, 2003, he underwent a left internal

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[2] Rec. Doc. No. 25-2, pp. 1-2

[3] Admin Rec. 70.

[4] Admin Rec. 2.

[5] Rec. Doc. No. 1.

[6] Rec. Doc. No. 29, p.2.

[7] Admin Rec. 462

mammary artery implant.[8] On February 4, 2004, plaintiff underwent a Cardiolite stress test, which showed normal blood pressure response and a borderline abnormal baseline ECG. The test was clinically positive for ischemia,[9] but electrocardiographically negative for ischemia.[10]

On March 4, 2004, plaintiff underwent another Cardiolite stress test, which noted that he achieved 90% of his maximum predicted heart rate and achieved 9.4 METS of activity. As plaintiff points out, the report also concluded that he was clinically borderline positive for myocardial ischemia versus deconditioning and electrocardiographically borderline positive.[11]

On June 7, 2004, plaintiff had his last doctor visit prior to his June 25, 2004 stated disability date.[12] Plaintiff complained of dyspnea on walking from the front door to the car and fatigue. Dr. Kusnick noted plaintiff complained of insomnia and severe work related stress, including a very adversarial supervisor. His blood pressure was 140/90 and his weight was 262 pounds.[13]

Meanwhile, beginning on April 21, 2004, and

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[8] Admin Rec. 252.

[9] Ischemia is defined as a "condition in which a part of the body suffers from a lack of blood, usually because of a contraction of the blood vessels, as in myocardial ischemia (caused by a narrowing of the coronary arteries)." 3 ATTORNEYS DICTIONARY OF MEDICINE 4377 (2005).

[10] Admin Rec. 282.

[11] Admin Rec. 284.

[12] Rec. Doc. No. 29, p. 2

[13] Admin Rec. 458.

continuing consistently through June 7, 2004, plaintiff sent resumes to numerous employers and contacts, seeking a sales or sales manager position. [14] He sent one final resume on June 22, 2004, three days before his stated disability date and one day before the disability letter issued by his doctor.[15]

In a letter dated June 23, 2004, Barry Kusnick, M.D., plaintiff's treating physician and a board certified cardiologist, informed Reliance that plaintiff was "classified as permanently disabled effective immediately." Dr. Kusnick noted plaintiff's medical history of 14 heart catheterizations, 2 angioplasty interventions, 3 coronary artery stent placements, an aortic value replacement in 1982, and the February 2003 artery bypass procedure. He also noted defendant's current treatment with multiple cardiovascular medications and weekly follow-up in the Coumadin clinic. Dr. Kusnick stated that it was his medical opinion that plaintiff discontinue full or part-time work immediately, given his medical history, continued physical decline, and increase in objective symptoms.[16]

On June 25, 2004, plaintiff's employer filled out the Reliance claim form, stating that plaintiff's occupation requires frequent standing, walking, and sitting, and occasional lifting/carrying of up to 45 pounds.[17]

On July 26, 2004, at his first visit subsequent to his stated disability date, plaintiff told Dr. Kusnick

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[14] Admin Rec. 109-122.

[15] Admin Rec. 124.

[16] Admin Rec. 457.

[17] Admin Rec. 225.

that he had walked 1.5 miles in 35 minutes.[18] Plaintiff subsequently moved to Charlotte, North Carolina, and he was examined by Richard Jacoby, M.D., a board certified cardiologist, on December 7, 2004.[19] On a follow-up visit to Dr. Jacoby on December 23, 2004, plaintiff complained of some chest discomfort while playing golf. Dr. Jacoby noted that, besides some increased chest discomfort, plaintiff "has done well."[20] In a letter following a March 3, 2005, office visit, Dr. Jacoby wrote that plaintiff's functional limitations, including dyspnea on exertion, "would make meaningful employment difficult."[21]

At the request of Reliance, in a review dated August 25, 2004, nurse Dorothy McGarry reviewed plaintiff's medical records. McGarry noted that plaintiff exercised to 9.4 METS, but he had an abnormal adenosine portion positive for chest pain and moderate ischemic changes. She concluded that he was "capable of sedentary restrictions and limitations" and that these restrictions and limitations would have to be permanent.[22]

At the request of Reliance, in a letter dated September 11, 2004, cardiologist Marvin Goldstein, M.D., reviewed the medical records and interpreted the March, 2004 stress test to indicate that Mr. Cross

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[18] Rec. Doc. No. 29, p. 2.

[19] Admin Rec. 43

[20] Admin Rec. 40.

[21] Admin Rec. 36.

[22] Admin Rec. 261.

should be able to perform a light duty occupation.[23]

Dr. Goldstein saw no evidence of any change in Cross's cardiac condition on or around June 2004, [24] when his disability allegedly occurred.

On March 16, 2005, following the initial denial of benefits by Reliance and at plaintiff's request, William Porter, M.D., who practices in internal medicine, hematology, and oncology, [25] reviewed plaintiff's medical records. Dr. Porter noted that the January 5, 2005 stress test showed a normal ejection fraction and no wall motion abnormalities. Still, Dr. Porter noted plaintiff's "significant extertional dyspnea" and concluded that Mr. Cross "is totally and permanently disabled for any occupation." Dr. Porter went on to state, "It is my opinion that Mr. Cross's

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[23] Dr. Goldstein relied on the light duty classification provided by two different medical sources: (1) an article in the Journal of American College of Cardiology, and (2) Clinical Cardiac Rehabilitation, edited by Pashkow and Dafoe. Admin Rec. 256. The first source describes light occupational work as "carrying light weight objects, i.e., 20 lb" and sedentary work as "sitting, slow walking, lifting light objects, i.e., 10 lb." Admin Rec. 257. The second source describes light work as including "walking (3-4 mph)" and "stocking shelves (light objects)," and "light carpentry." Admin Rec. 258.

Although Dr. Goldstein did not specifically rely on the DOT occupational categories with which Reliance determined plaintiff's occupational requirements, the Court finds that the sources upon which Dr. Goldstein relied impose standards for "light" work that are at least as stringent as those imposed by the DOT occupational titles applicable to plaintiff. See infra note 49. Therefore, Reliance could properly rely on Dr. Goldstein's determination that plaintiff could perform the material duties of his "light exertion occupation." See Admin Rec. 6.

[24] Rec Doc. No. 29, p. 2; Admin Rec. 256

[25] Admin Rec. 11.

physicians have been correct when they advised him to quit work, based on the probability that continued employment, even in a relatively sedentary occupation, would pose considerable medical risk to Mr. Cross."[26]

Plaintiff also made a declaration on March 10, 2005, as additional support for his claim. In that statement, plaintiff argued that his position with Diversified was not "sedentary" and involved significant activity, such as giving plant tours, traveling, and demonstrating products.[27] Plaintiff also noted the considerable stress of his position and his supervisor's "relentless" expectations.[28] Plaintiff stated that his physical condition had worsened to the point that it was "extremely difficult" for him to do household activities like taking out the trash.[29]

On April 26, 2005, Jeffrey F. Caren, M.D., a board certified cardiologist, conducted a peer review of plaintiff's medical records on behalf of Reliance. Dr. Caren classified plaintiff as having a Class II cardiac condition, which is defined by the Criteria Committee of the New York Heart Association as "Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea, or anginal pain."[30] Dr. Caren found that the Cardiolite testing revealed "a low risk profile for future cardiac events." Dr. Caren concluded that plaintiff was capable of working at a light occupation, as defined by

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[26] Admin Rec. 9-10.

[27] Admin Rec. 23-24.

[28] Admin Rec. 24.

[29] Admin Rec. 26.

[30] Rec. Doc. No. 29, p. 3.

the U.S. Department of Labor's Dictionary of Occupational Titles.[31]

LAW AND ANALYSIS

I. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party carries its burden of proving that there is no material factual dispute, the burden shifts to the non-movant "to show that summary judgment should not lie." *Hopper v. Frank*, 16 F.3d 92, 96 (5th Cir. 1994). While the court must consider the evidence with all reasonable inferences in the light most favorable to the non-movant, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986); *Webb v. Cardiothoracic Surgery Associates of North Texas*, 1998 WL 175313, *2 (5th Cir. 1998). This requires the nonmoving party to do "more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec., 475 U.S. at 586, 106 S.Ct. at 1356. The nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v.*

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[31] Admin Rec. 254.

Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986); *Auguster v. Vermillion Parish School Board*, 249 F.3d 400, 402 (5th Cir. 2001). In this case, there is no genuine issue as to any material fact, and the Court finds that defendants are entitled to a judgment as a matter of law.

II. Standard of Review Pursuant to ERISA

ERISA provides the federal courts with jurisdiction to review determinations made by administrators of employee benefit plans. 29 U.S.C. Â§ 1132(a)(1)(B); *Vega v. National Life Ins. Services, Inc.*, 188 F.3d 287, 295 (5th Cir. 1999) (en banc). The district court reviews two elements of the benefit determination-the factual findings of the administrator and the administrator's interpretation of the ERISA governed policy. *Green v. Prudential Ins. Co. of America*, No. 04-3101, 2005 WL 2036788, at *5 (E.D. La. Aug. 5, 2005) (Fallon, J.).[32]

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[32] The Fifth Circuit has explained the analytic methodology applicable to ERISA cases as follows:

> In sum, ERISA and its regulations contemplate a system in which the administrator makes a decision as to whether to grant or deny benefits based on the factual scenario and based on its interpretation of the relevant plan provisions . . . . If the administrator denies benefits, the claimant may bring suit under Â§ 1132. The district court will then engage in a deferential review of the administrator's factual determinations, based on the record before the administrator. Next, depending on whether the plan expressly grants the administrator discretion in interpreting its terms, the reviewing court will review the administrator's interpretation of the plan provisions either under a de novo or an abuse of

An administrator's factual determinations underlying a decision to deny benefits are entitled to deference and are reviewed for an abuse of discretion. *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1562 (5th Cir. 1991). When applying the abuse of discretion standard, courts in this Circuit analyze whether an administrator has acted arbitrarily or capriciously. *Lain v. UNUM Life Ins. Co.*, 279 F.3d 337, 342 (5th Cir. 2002).

A plan administrator's factual determinations are arbitrary if they have "[no] rational connection between the known facts and the decision or between the found facts and the evidence." Id. at 342 (quoting *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Michigan*, 97 F.3d 822, 828 (5th Cir. 1996)). A plan administrator does not abuse its discretion if its factual determinations are "based on evidence, even if disputable, that clearly supports the basis for its denial." *Vega*, 188 F.3d at 299. A court must find an abuse of discretion in the absence of "some concrete evidence in the administrative record that supports the denial of the claim." Id. at 302. The Court is "constrained to the evidence before the plan administrator." Id. at 299.

A plan administrator's construction of the meaning of plan terms and plan benefit entitlement provisions is reviewed de novo unless there is an express grant of discretionary authority in that respect, in which case the review of those decisions is for abuse of discretion. *Vercher v. Alexander & Alexander Inc .*, 379 F.3d 222, 226 (5th Cir. 2004). In this case, plaintiff stipulates that the plan grants discretionary authority

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discretion standard. *Schadler v. Anthem Life Ins. Co.*, 147 F.3d 388, 395 (5th Cir. 1998).

to Reliance over the interpretation of the policy.[33]

The Fifth Circuit has set forth a two-step methodology for testing a plan administrator's interpretation of a plan for abuse of discretion. *Vercher*, 379 F.3d at 227. Under such an analysis, the court first determines the legally correct interpretation of the plan and whether the administrator's interpretation accords with the proper legal interpretation. In order to determine the legally correct interpretation of the plan, a court must consider: (1) the uniformity of the plan administrator's interpretation; (2) whether that interpretation is consistent with a fair reading of the plan; and (3) any unanticipated costs resulting from different interpretations of the plan. Id. at 228. If the administrator's construction is legally sound, then no abuse of discretion occurred and the inquiry ends.

If the court concludes that the administrator has not given the plan the legally correct interpretation, the court must then determine whether the administrator's interpretation constitutes an abuse of discretion. Id. at 227-28. To determine whether an abuse of discretion has occurred, the Fifth Circuit has identified four factors: (1) the plan's internal consistency under the administrator's interpretation, (2) any relevant regulations, (3) the factual background underlying the decision, and (4) any indication of lack of good faith. Lain, 279 F.3d at 346.

Where, as here, the plan administrator is also the insurer, the administrator has an inherent conflict of interest. *Green,* 2005 WL 2036788, at *6 (citing Lain, 279 F.3d at 343). When an administrator acts under a conflict of interest, the Court applies a "sliding

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[33] Rec. Doc. No. 25-2, P. 10. The policy states that Reliance "shall serve as the claims review fiduciary with respect to the insurance policy and the Plan. The claims review fiduciary has the discretionary authority to interpret the plan and the insurance policy and to determine eligibility for benefits." Admin Rec. 155.

scale" to the abuse of discretion standard. Id. (citing *Vega*, 188 F.3d at 297). "The existence of a conflict is a factor to be considered in determining whether the administrator abused its discretion in denying a claim. The greater the evidence of conflict on the part of the administrator, the less deferential our abuse of discretion standard will be." *Vega*, 188 F.3d at 297. However, this review "need only assure that the administrator's decision fall somewhere on a continuum of reasonableness-even if on the low end." Id.

III. Analysis

A. Interpretation of the Policy

Benefit Determination by Reliance

In its June 16, 2005 letter affirming the denial of benefits, Reliance found that plaintiff was not entitled to long term disability benefits because the claim file did not support a finding of "total disability," as defined in the policy.[34] In pertinent part, the policy defines "total disability" as meaning, that as a result of injury or sickness, "during the Elimination Period and for the first 24 months for which a Monthly Benefit is payable, an Insured cannot perform the material duties of his/her regular occupation."[35] The elimination period under the policy is 90 consecutive days of total disability, beginning on the first date of total disability.[36]

Under those terms, plaintiff had to be totally

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[34] Admin Rec. 2

[35] Admin Rec. 151.

[36] Admin Rec. 148

disabled on June 25, 2004, the date of plaintiff's claimed total disability, through September 23, 2004, for benefits to be payable.[37] In its review letter, Reliance discussed the findings of plaintiff's treating physicians, as well as the report of plaintiff's consultant, Dr. Porter.[38] Reliance also noted plaintiff's March 10, 2005 statement as evidencing an adversarial relationship between plaintiff and his boss, rather than an inability to perform the material duties of his occupation. Reliance noted that emails from plaintiff seeking other sales and management positions, including one as late as June 22, 2004, further support the belief that it was this adversarial relationship, rather than plaintiff's health condition, which made his continued employment at Diversified untenable.[39]

In its letter, Reliance also defined its basis for determining the "material duties" of an individual's "regular occupation" in order to assess benefits eligibility. Reliance stated that it uses the Dictionary of Occupational Titles (DOT) published by the Department of Labor to determine the material requirements of an occupation. Reliance stated that the position requirements of "Director of National Sales" were reviewed by a vocational specialist who determined that plaintiff's position was represented by the DOT titles "light Sales Representative" and "sedentary Manager Sales." [40] Therefore, plaintiff's regular occupation would be performed at the "light exertion capacity." Reliance specifically noted that the policy is based on ability to perform an employee's

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[37] Admin Rec. 3.

[38] Admin Rec. 4.

[39] Admin Rec. 5.

[40] Admin Rec. 4-5.

regulation occupation, as opposed to a specific job: "The difference between an occupation and a job being that an occupation is a vocation or profession as it typically exists in the general labor market whereas a job is a set of specific tasks performed for a specific employer."[41]

In conclusion, Reliance relied on the findings of Dr. Goldstein and Dr. Caren when it determined that plaintiff was capable of performing full time employment at the light exertion level. Since Reliance found that the material requirements of plaintiff's occupation can be performed at the light exertion level, Reliance determined plaintiff did not meet the "total disability" requirement to receive benefits under the policy.[42]

Definition of "Regular Occupation"

Plaintiff challenges Reliance's interpretation of the plan term "regular occupation," asserting that the policy does not define the term and that Reliance's interpretation is not entitled to deference. In addition to its potential conflict of interest as fiduciary, plaintiff argues that Reliance has inconsistently used the term "occupation." Plaintiff notes that Reliance's claim form for employers asks specific questions about the physical aspects of the "employee's occupation."[43] Plaintiff argues that if "occupation" merely refers to a job as performed in the general labor market, then Reliance should not need to ask an employer specifics about the "occupation." Plaintiff asserts that this indicates an internal inconsistency in the

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[41] Admin Rec. 5.

[42] Admin Rec. 6.

[43] Admin Rec. 225.

interpretation of the term occupation, which the Court should reject and instead find plaintiff's work to be "'medium' work, directing a finding of disability."[44]

Defendant counters that if it simply asked the employer to provide the job title, it might not be able to find the comparable occupation in the DOT; therefore, there is no inconsistency between its claim form and the policy interpretation.[45] Defendant also notes that other courts have upheld interpretations of the term "occupation" which conclude that the term does not refer to a claimant's specific job duties.[46]

In *Osborne v. Hartford Life and Accident Insurance Company*, the Sixth Circuit found that an insurance policy granting the insurer discretionary authority to interpret policy terms permitted the insurer to use the DOT definitions to determine the employee's "own occupation" under the policy. 465 F.3d 296, 299 (6th Cir. 2006). The Court found this definition appropriate under the insurer's discretionary authority, despite that it acted as both insurer and plan administrator. Id. at 300. The Court stated:

> The word "occupation" is sufficiently general and flexible to justify determining a particular employee's "occupation" in light of the position descriptions in the [DOT] Dictionary rather than examining in detail the specific duties the employee performed. "Occupation" is a more general term that seemingly refers to categories of work than narrower employment terms like

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[44] Rec. Doc. No. 25-2, p.23.

[45] Rec. Doc. No. 26, p. 14.

[46] Rec. Doc. No. 26, p. 14.

> "position," "job," or "work," which are more related to a particular employee's individual duties.

Id. at 299. The Court additionally noted that "many courts have upheld a plan administrator's interpretation of 'regular occupation' as meaning a general occupation rather than a particular position with a particular employer." Id. at 300 (quoting *Schmidlkofer v. Directory Distrib., Assoc., Inc.*, 107 Fed. Appx. 631, 633 (6th Cir. 2004) (unpublished)).

Likewise, applying de novo review in a case where the policy did not grant Reliance discretionary authority, the Fourth Circuit held that Reliance properly relied on the DOT to define the employee's "regular occupation." See *Gallagher v. Reliance Standard Life Ins. Co.* , 305 F.3d 264, 272 (4th Cir. 2002).[47]

Given the holdings in *Osborne* and *Gallagher* and the facts of this case, and applying the Fifth Circuit's three-part test in Lain, the Court concludes that Reliance applied a legally correct interpretation of the term "regular occupation." "In the instant case, there has been no allegation or evidence as to whether [Reliance] gave the Policy a uniform construction." Lain, 279 F.3d at 344. The only potential unanticipated cost resulting from a different interpretation of the policy would be that Reliance may have to pay benefits to plaintiff and possibly other employees or former employees. Id. Therefore, "[t]he crucial issue in this case is whether [Reliance's] interpretation of the Policy is fair and reasonable." Id.

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[47] In its de novo review, the Fourth Circuit noted, "A general description of the DOT, to be applicable, must involve comparable duties but not necessarily every duty." *Gallagher*, 305 F.3d at 272. The Court found that the DOT job description was appropriate even though it omitted the travel requirement of plaintiff's specific job. Id. at 273.

As the Sixth Circuit in *Osborne* noted, "occupation" is a broader term than "job" or "work," and therefore sensibly refers to the general requirements of a position, rather than the intricacies of the work required for any one employer at a given moment in time. Therefore, Reliance's definition of "occupation" as "a vocation or profession as it typically exists in the general labor market" [48] is fair and reasonable. As applied to plaintiff through the DOT titles of "light Sales Representative" and "sedentary Manager Sales," the Court also finds Reliance's interpretation to be fair. [49] Reliance has employed a

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[48] Admin Rec. 5.

[49] For instance, the DOT sales representative occupational category states:

> Lifting, Carrying, Pushing, Pulling, 20 Lbs. occasionally, frequently up to 10 lbs, or negligible amount constantly. Can include walking and or standing frequently even though weight is negligible. Can include pushing and or pulling of arm and or leg controls.

Admin Rec. 210. The DOT sales manager category states: "Lifting, Carrying, Pushing, Pulling, 10 Lbs. occasionally. Mostly sitting, may involve standing or walking for brief periods of time." Admin Rec. 205. The employer's report regarding plaintiff's duties largely reflects these duties, even noting that pushing and pulling were never required. Admin Rec. 225. While the employer's report indicates plaintiff occasionally had to lift or carry up to 45 lbs, see id., the Court finds that this discrepancy does not make Reliance's definition unreasonable or unfair. As in Gallagher, the DOT description involves "comparable duties," even if not every duty. Gallagher, 305 F.3d at 272. Moreover, as in Gallagher, plaintiff must demonstrate that he was unable to perform even some of the material duties of his occupation during the elimination period in order to be eligible for benefits. Id.; Admin Rec. 151 (under plan terms, plaintiff is "partially disabled," not "totally disabled" as

legally correct interpretation of the term "regular occupation." Accordingly, there can be no abuse of discretion regarding this interpretation of the plan.[50]

B. Support for the Administrator's Decision

Plaintiff also challenges the support for Reliance's decision, arguing that it improperly disregarded the opinions of plaintiff's treating physicians in favor of its two consultants, and that its conflict of interest as fiduciary and insured should lead this Court to afford Reliance little or no deference. Plaintiff challenges the findings of defendant's first consulting doctor, Dr. Goldstein, arguing that his finding of light work capacity is unsound since plaintiff has ischemic heart disease and the data table on which Dr. Goldstein relied has not been verified for patients with the disease. Plaintiff also notes that Dr.

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required during the elimination period, if he can perform some material duties on a full-time basis). Therefore, if he fails to demonstrate that he is unable to perform some other material duties of his occupation, an inability to occasionally lift or carry 45 lbs "would not save his claim." *Gallagher*, 305 F.3d at 272.

[50] The Court notes that it finds no internal inconsistency in Reliance's use of the term "regular occupation." While plaintiff is correct that Reliance uses the term "employee's occupation" on its job-specific claim form for employers, the Court accepts Reliance's explanation that it might not be able to find the comparable occupation in the DOT without this additional information regarding an employee's duties. In essence, this information aids Reliance in determining the fair and proper occupational title for a given employee; labeling the form in reference to the "employee's occupation" is, therefore, consistent with the ultimate goal of determining the proper occupational category.

Goldstein's approximation that plaintiff could walk three miles per hour is mathematically incorrect.[51]

Defendant counters that plaintiff's testing does not support a diagnosis of ischemia. Plaintiff's February 4, 2004, testing was clinically positive for ischemia, but electrocardiographically negative for ischemia.[52] Additionally, the March 4, 2004 testing indicated that plaintiff was only "clinically borderline positive for myocardial ischemia versus deconditioning," and "scintigraphically negative without evidence of stress induced myocardial ischemia."[53] While not disputing Dr. Goldstein's faulty math, defendant notes that his conclusions were also based on plaintiff's MET capacity. Based on the test results, the Court finds no evidence of bias or unreasonableness in Dr. Goldstein's finding of a light work occupational classification.

Plaintiff also attacks Dr. Caren's opinion as unsupported by the testing and facts of plaintiff's case. Despite plaintiff's efforts to emphasize certain aspects of plaintiff's test results,[54] the Court also finds no evidence of bias or unreasonableness in Dr. Caren's findings.[55]

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[51] Rec. Doc. No. 25-2, p. 13. As plaintiff points out, based on plaintiff's statement that he walked 1.5 miles in 35 minutes, plaintiff's speed would be 2.57 mph, not 3 mph as suggested by Dr. Goldstein. Id.

[52] Admin Rec. 282.

[53] Admin Rec. 284.

[54] Rec. Doc No. 25-2, pp 18-20

[55] Dr. Caren's April 26, 2005, review states that he reviewed 15 documents in forming his opinion, including records of plaintiff's treating physicians, test and hospital reports, Dr.

Plaintiff also faults Reliance for its failure to credit the findings of its initial consultant, Nurse McGarry, noting that she found plaintiff would be permanently subject to sedentary restrictions and limitations.[56] However, as defendant notes, her evaluation was based on the information available in the claim file merely two months after it was initially filed.[57] Moreover, the opinion was also based on her training and experience as a nurse, not a cardiologist. The Court finds no suspect motive in Reliance's decision to seek the evaluation of trained cardiologists and in deciding to value those opinions over the limited findings of Nurse McGarry.

Overall, plaintiff asserts that the findings of Reliance are entitled to little or no deference by this Court because they are driven's by Reliance's financial conflict of interest in making a negative benefits determination. Although the record certainly supports some disagreement among doctors as to the full extent of plaintiff's limitations, the record does not support that Reliance has manipulated the facts or acted unreasonably to reach its decision as administrator of the plan. Instead the Court finds that Reliance's

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Porter's assessment, and plaintiff's personal declaration. Admin Rec. 251-52. Moreover, while plaintiff disputes Dr. Caren's conclusions regarding plaintiff's test results, those conclusions are his as a board-certified cardiologist. The Court finds no credible evidence that Dr. Caren distorted or disregarded plaintiff's medical history and/or test results to reach some pre-determined medical diagnosis, and Reliance acted reasonably in considering his opinion in making its benefit eligibility determination.

[56] Admin Rec. 261.

[57] Dr. Goldstein's letter is dated September 11, 2004, two two weeks later. Admin Rec. 256. Dr. Caren's review is dated April 26, 2005. Admin Rec. 251

decision was "based on evidence, even if disputable, that clearly supports the basis for its denial." *Vega*, 188 F.3d at 299.

While plaintiff strongly protests Reliance's decision to disfavor the findings of plaintiff's treating physicians, the Supreme Court has explicitly rejected a rule that would afford deference to the findings of treating physicians in ERISA cases. In *Black & Decker Disability Plan v. Nord*, the Supreme Court held that courts may not "require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." 538 U.S. 822, 834, 123 S.Ct. 1965, 1972, 155 L.Ed. 2d 1034 (2003). However, plan administrators may not "arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." See also *Vercher*, 379 F.3d at 233 (insurer appropriately considered treating physicians' diagnoses, but it was not required to give those opinions determinative weight).

As stated, Reliance reviewed the findings of plaintiff's treating physicians, Dr. Jacoby and Dr. Kusnick, during the relevant time period. Reliance also reviewed the evaluation of plaintiff's consulting physician, Dr. Porter.[58] Thus, it is clear that Reliance considered the diagnoses of those doctors, even though it permissibly cast doubt on their conclusions. Reliance instead chose to base its decision on the conclusions of Dr. Goldstein and Dr. Caren,[59] who found that plaintiff could perform light duty work. This crediting of their opinions over those of plaintiff's physicians is permissible under Nord. Although plaintiff also

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[58] Admin Rec. 4.

[59] Admin Rec. 4.

complains that the stress accompanying his job was not considered,[60] this evidence was included in plaintiff's statement, which Dr. Caren considered in forming his opinion.[61] See *Gooden v. Provident Life & Acc. Ins. Co.*, 250 F.3d 329, 335 n.8 (5th Cir. 2001).

Moreover, Reliance cited other evidence in the record in support of its decision to deny benefits. Reliance found plaintiff's March 10, 2005 statement to be reflective of an adversarial relationship with his boss. Plaintiff's repeated emails seeking sales and management jobs in the period shortly before his claimed disability provide further evidence in support of Reliance's conclusion that plaintiff was not disabled and instead was seeking a lifestyle change. Reliance also noted the timing of the emails and plaintiff's infrequent visits to his cardiologist in the time period immediately surrounding his claimed disability date. As Reliance notes, prior to terminating his employment, plaintiff was performing the material duties of his job, and there is no documentation of a significant deterioration in his condition at or around his claimed disability date.[62]

Given this evidence, Reliance's determination that plaintiff was not incapable of performing the material duties of his regular occupation was not unfair or unreasonable. The finding was based on evidence in the record that, although disputable, "clearly supports the basis for its denial." *Vega*, 188 F.3d at 299; see also *Green*, 2005 WL 2036788, at *8. And the finding is rationally connected to the evidence

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[60] Rec. Doc. No. 25-2, p. 23-24.

[61] Plaintiff's statement was prepared subsequent to Dr. Goldstein's evaluation and, therefore, could not be considered by him.

[62] Admin Rec. 5-6.

in the record. Lain, 279 F.3d at 342; see also *Matney v. Hartford Life and Accident Ins. Co.* , 172 Fed. Appx. 571, 573 (5th Cir. 2006) (unpublished). Accordingly, although the Court considers the financial conflict of Reliance and plaintiff's other assertions of conflict,[63] this Court is bound to conclude that Reliance's decision as administrator has fallen "somewhere on a continuum of reasonableness" and was not an abuse of discretion. See *Vega*, 188 F.3d at 297.

Accordingly, for the above and foregoing reasons, IT IS ORDERED that defendants' motion [64] for summary judgment is GRANTED and plaintiff's motion[65] for summary judgment is DENIED.

New Orleans, Louisiana, April 20th, 2007

S/ Lance M. Africk
UNITED STATES DISTRICT JUDGE

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[63] As noted through this Order, plaintiff has asserted numerous purported examples of Reliance's conflict of interest. The Court has considered those examples, including examples not explicitly addressed here, and finds no credible evidence of a conflict beyond the basic fact of Reliance's financial interest.

[64] Rec. Doc. No. 18

[65] Rec. Doc. No. 25.

APPENDIX B:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARTHUR CROSS,	CIVIL ACTION
versus.	No. 06-3507
RELIANCE STANDARD LIFE INSURANCE COMPANY, ET AL.	SECTION "I" /5

JUDGMENT

Considering the record, the Court's order granting defendants' motion for summary judgment, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of defendants, Reliance Standard Life Insurance Company and Diversified Foods, Inc., and against plaintiff, Arthur "Skip" Cross, **DISMISSING WITH PREJUDICE** plaintiff's claims, each party to bear its own costs.

New Orleans, Louisiana, April 20th, 2007

S/ Lance M. Africk

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

APPENDIX C:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30473
Summary Calendar

ARTHUR CROSS, also know as Skip Cross

Plaintiff-Appellant

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY; DIVERSIFIED FOODS AND SEASONINGS INC

Defendant-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:06-CV-3507

Before KING, DAVIS and CLEMENT, Circuit Judges

PER CURIAM*

Plaintiff-Appellant Arthur Cross appeals the district court's grant of summary judgment in favor of Defendants-Appellees Reliance Standard Life Insurance Company ("Reliance") and Diversified Foods and Seasonings, Inc. ("Diversified") on Cross's claim for wrongful denial of disability benefits. We AFFIRM.

I. FACTS AND PROCEEDINGS

Cross was hired by Diversified as Director of National Account Sales on January 1, 2001. As of April 1, 2001, Cross was insured under Diversified's Long-Term Disability Plan ("Plan"), which is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. To receive benefits under the terms of the Plan for the first twenty-four months of the claim, a claimant must be found to be totally disabled, which means that he cannot perform the material duties of his regular occupation. The claimant must be totally disabled throughout the elimination period of ninety days from the first date of total disability.

Cross had an aortic valve abnormality which first required surgery in 1984, and afterwards he occasionally experienced cardiac symptoms and underwent additional catheterization and stenting procedures. On April 3, 2002, Carlos Sotolongo, Cross's physician, indicated that Cross was never expected to return to full or part-time work. On February 24, 2003, Cross underwent a left internal mammary artery implant. On February 4, 2004, he took a stress test

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4 .

which showed normal blood pressure response and a borderline abnormal baseline electrocardiogram. The test was clinically positive for ischemia [1]but electrocardiographically negative for it. Cross underwent a second stress test on March 4, 2004, in which he achieved ninety percent of his maximum predicted heart rate. He also achieved 9.4 METS[2] The test also indicated that he was clinically borderline positive for myocardial[3] ischemia versus deconditioning and electrocardiographically borderline positive. On June 7, 2004, he visited cardiologist Barry Kusnick, his last doctor visit before his June 25, 2004 stated disability date. He complained of fatigue, dyspnea[4] on walking from his front door to the car, insomnia, and severe work-related stress. Kusnick's notes from the visit indicate that Cross "appear[ed] distraught" and indicated "severe . . . work stress. Up against a very adversarial supervisor."

Beginning on April 21, 2004 and continuing through June 7, 2004, Cross sent resumes to several employers and contacts, seeking a sales or sales

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[1] "Local anemia due to mechanical obstructions (mainly arterial narrowing or disruption) of the blood supply." STEDMANS MEDICAL DICTIONARY 211420 (27th ed. 2000)

[2] Metabolic equivalents are "used to estimate the oxygen cost of activity...[and] more than 9 mets [indicates] heavy work." STEDMANS MEDICAL DICTIONARY 136370 (27TH ed. 2000)

[3] The myocardium is [t]he middle layer of the heart, consisting of cardiac muscle."

[4] "Shortness of breath, a subjective difficulty or distress in breathing, usually associated with disease of the heart or lungs." STEDMANS MEDICAL DICTIONARY 122310 (27th ed. 2000)

manager position. On June 22, 2004, three days before his stated disability date and one day before the disability letter issued by his doctor, Cross sent one final resume to a prospective employer.

In a letter dated June 23, 2004, Kusnick informed Reliance that Cross was permanently disabled effective immediately, noting Cross's extensive medical history. Cross's claimed disability date was June 25, 2004 and his elimination period ran through September 23, 2004. On July 26, 2004, when first visiting Kusnick after his disability date, Cross told him that he had walked 1.5 miles in thirty-five minutes.

Reliance requested a review of Cross's medical records by nurse Dorothy McGarry which was conducted on August 25, 2004. She concluded that Cross was "capable of sedentary restrictions and limitations" which would have to be permanent. Reliance then requested a review by cardiologist Marvin Goldstein who evaluated Cross's records and the March 2004 stress test and concluded that Cross should be able to perform a light duty occupation. He saw no change in Cross's cardiac condition on or around June 2004, when the disability was to have occurred. On September 24, 2004, Reliance denied Cross's application for long-term disability benefits. After claiming disability, Cross moved to North Carolina. There, on December 7, 2004, he saw cardiologist Richard Jacoby, his first doctor's visit since his July 26, 2004 appointment with Kusnick. After a March 3, 2005 office visit, Jacoby wrote that Cross's functional limitations, largely based upon Cross's reports of dyspnea on completing daily activities, "would make meaningful employment difficult."

Cross requested a review of his medical records by another doctor, William Porter, who practiced in internal medicine, hematology, and oncology. Porter indicated that a January 5, 2005 stress test was normal but still noted Cross's significant dyspnea and

concluded that he was disabled for any occupation as continued employment would pose considerable medical risk to him. On March 10, 2005, Cross made a declaration that his position with Diversified was not sedentary and involved significant activity. He also noted the considerable stress of his position and his supervisor's relentless expectations. He, however, added that the stress level would be similar at other companies.

At Reliance's request, Jeffrey Caren, a cardiologist, reviewed Cross's records from Sotolongo, Kusnick, Goldstein, Jacoby, Porter, Cross's declaration, the 2004 stress tests, and additional reports from December 2004. Caren concluded that Cross was capable of working at a light occupation.

Following an administrative appeal, Reliance made a final determination that Cross was not entitled to disability benefits under the Plan. Reliance noted, "Dr. Jacoby documents that Mr. Cross's reported functional limitations would make 'meaningful employment difficult.'" It also observed that Kusnick indicated that Cross was at "maximum medical rehabilitative state," even though he had not participated in a cardiac rehabilitation program after his bypass surgery which had been recommended by Kusnick. In response to Porter's concerns about job-related stress, Reliance noted that Cross's blood pressure remained constant from before stopping to work to nine months after stopping work.

Reliance observed that the Plan provided benefits if Cross was unable to perform the material duties of his occupation, not his job which it defined as "a set of specific tasks performed for a specific employer." It concluded that Cross's stress associated with his adversarial supervisor was a specific job circumstance, but did not preclude him from performing his occupation. Reliance pointed to Cross's attempts to find similar jobs up until he claimed

disability. It also noted that Cross did not consult with his cardiologist between January 21, 2004 and June 7, 2004. However, Cross emailed his resume for a sales and management position on the evening after the June 7, 2004 doctor visit. He sent his last resume on June 22, 2004, the day before Kusnick sent a letter in support of Cross's disability.

Cross commenced this action on July 6, 2006. After both parties filed motions for summary judgment, the district court granted Reliance's motion on April 20, 2007. Cross appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the district court's decision that a plan administrator did not abuse its discretion in denying disability benefits. *Barhan v. Ry-Ron Inc.*, 121 F.3d 198, 201 (5th Cir. 1997). Because the terms of the Plan give the plan administrator discretionary authority to determine benefits, the district court reviews the denial of benefits for abuse of discretion. Id. "[I]f the administrator's decision on eligibility is supported by substantial evidence and is not erroneous as a matter of law, it will be upheld." Id. However, because Reliance acts as both the insurer and the plan administrator, it operates under a conflict of interest because it "potentially benefits from every denied claim." *Vega v. Nat'l Life Ins. Servs., Inc.*, 188 F.3d 287, 295 (5th Cir. 1999). This Court therefore applies a "sliding scale standard" and grants Reliance's decision "less than full deference." *Gooden v. Provident Life & Accident Ins. Co.*, 250 F.3d 329, 333 (5th Cir. 2001). "The greater the evidence of conflict on the part of the administrator, the less deferential our abuse of discretion standard will be." *Vega*, 188 F.3d at 297. However, "our review of the administrator's decision need not be particularly complex or technical; it need only assure that the administrator's decision fall

somewhere on a continuum of reasonableness-even if on the low end." Id.

III. DISCUSSION

Cross primarily claims that the stress of his occupation exacerbated his heart condition. He argues that Reliance's actions or inaction in evaluating his claim evidences a conflict of interest and that, therefore, we should accord its decision less deference. He concurrently points to Reliance's actions or inaction to indicate that its decision to deny him benefits was arbitrary and capricious. Cross concedes that he could have physically performed the requirements of his job on the day after he retired. He does not challenge Reliance's interpretation of the Plan that he had to be disabled from performing the material duties of his occupation, not his specific job, to qualify for benefits. He also concedes in his reply brief that a plan administrator's decision is not necessarily arbitrary and capricious because it accepts the decisions of its physicians conducting a review of records over the claimant's treating physicians. See *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601--03 (5th Cir. 1994).

Contrary to Cross's argument, the administrative record does not show a strong conflict of interest necessitating a less deferential review, nor does it show that Reliance was arbitrary and capricious in deciding Cross's claim. First, it was reasonable for Reliance to rely on Goldstein's opinion over that of McGarry's and Kusnick's. It was not arbitrary for Reliance to accept the opinion of a cardiologist over that of a nurse, McGarry. Moreover, Goldstein's opinion was based on the March 2004 stress test which was the test closest in time to Cross's claimed disability date. Goldstein relied on the best stress test available which gave objective indications of how

Cross's body would react to stress. Cross concedes in his reply brief that he was factually incorrect in his original brief in asserting that Goldstein was not provided with the previous opinions of Sotolongo and Kusnick. Goldstein considered those records when making his determination.

Although Cross claims there were several flaws in Goldstein's conclusions, we are not persuaded. He suggests that Goldstein's reliance on the March 2004 test was in error because it was performed approximately four months before the disability date. This argument does not support Cross's disability claim, because, if the most recent stress test was unreliable, then Kusnick had few, if any, objective bases for his conclusion that Cross became disabled on June 23, 2004. It is also difficult for Cross to argue that Goldstein's reliance on the test was misplaced because his doctors did not have him take another stress test for several months. Cross further claims that Goldstein erred in relying on the March 2004 test because his condition was deteriorating. However, the objective tests taken before and after his disability date indicate no such deterioration. Cross also argues that Goldstein erred in relying on an approximation of his walking speed to determine that he was capable of light work, but a review of Goldstein's report shows that he relied on objective data from the stress test for that particular determination. Furthermore, considering that Cross had reported the numbers used to determine his mile per hour walking rate a month after his disability date, neither Goldstein nor Reliance were unreasonable in approximating his walking speed.

Second, Reliance's acceptance of Caren's conclusion over Jacoby's and Porter's was also reasonable. Caren reviewed the records from the other physicians, the results of the 2004 stress tests, Cross's declaration, and additional tests from December 2004.

His conclusions were based on the objective evidence available in those records. On the other hand, Jacoby's opinion that meaningful employment would be difficult was based upon Cross's reported ailments months after his elimination period ended. Porter's conclusions had a similar basis. However, Porter also indicated that the objective data from a January 7, 2005 exercise test "showed a normal ejection fraction and no wall abnormalities." Because of the objective criteria used, Reliance reasonably accepted Caren's conclusions over Jacoby's and Porter's. Nor does its acceptance of Caren's opinion indicate a conflict of interest.

Furthermore, the record does not indicate that Reliance had a conflict of interest or was arbitrary and capricious in its evaluation of Cross's job stress. Goldstein's opinion was based upon stress tests that provided objective criteria to evaluate Cross's cardiac health. Cross's blood pressure remained constant from the periods before and after his disability date, indicating that job stress was not a factor in Cross's condition. Even if it were, the administrative record shows that the stress of which Cross complained was the result of his specific job, not his occupation. First, on June 7, 2004, Kusnick noted Cross's complaints about his adversarial relationship with his supervisor as a cause of his severe work stress. Second, Cross's own actions in seeking the same occupation in Florida at approximately the same time he applied for disability benefits, indicates that the stress that he claims was dangerously deleterious to his health was associated with his job at Diversified, not his occupation as a sales manager. While Cross speculated that such stress would occur in any sales manager position, his own actions indicate otherwise.

Cross specifically asks this Court to decide whether an insured's contemplation of working for another employer against medical advice would defeat an otherwise valid disability claim. We hold that,

based upon the facts of this case, Reliance was reasonable and exhibited no conflict of interest in considering Cross's actions in determining the validity of his claim. As Cross was the source of much of the bases for his doctors' opinions, the seriousness with which he took their advice was relevant in determining the validity of their conclusions. Cross's actions were also relevant in determining whether it was his job at Diversified or his occupation that was the cause of the stress he claimed to be harmful to him.

Cross also asks this Court to consider whether an insured is disabled if his occupation is "dangerously deleterious to his health" but could otherwise perform the work. We need not decide that question. Reliance did not conclude as a factual matter that Cross's occupation was dangerously deleterious to his health, and this Court holds that Reliance's conclusions were reasonable and not the result of a conflict of interest.

IV. CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX D:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30473
Summary Calendar

D.C. Docket No. 2:06-CV-3507

ARTHUR CROSS, also know as Skip Cross

Plaintiff-Appellant

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY; DIVERSIFIED FOODS AND SEASONINGS INC

Defendant-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

Before KING, DAVIS and CLEMENT, Circuit Judges

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: JANUARY 30, 2008

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(3)

No. 07-1274

FILED
MAY 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ARTHUR CROSS, a/k/a SKIP CROSS,

Petitioner,

v.

RELIANCE STANDARD
LIFE INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Decision is consistent with the analysis of this Court in *Black & Decker Disability Plan v. Nord* and where the decision does not conflict with a decision from any Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition and consolidate this case with *Metropolitan Life Insurance Company v. Glenn*, where this denial of disability benefits under an ERISA benefit plan cannot be considered wrong under any standard of review because the claimant acknowledges that he can physically perform the requirements of his job, he applied for similar positions with other companies at the time he claims he became disabled, he identified his problem at work as having "a very adversarial supervisor" and two independent specialists concluded that he is not totally disabled.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Reliance Standard Life Insurance Company has the following parent corporation:

> Reliance Standard Life Insurance Company of Texas

Reliance Standard Life Insurance Company identifies the following as a publicly held company that owns 10% or more of Reliance Standard Life Insurance Company's stock:

> Delphi Financial Group, Inc. owns the stock of Reliance Standard Life Insurance Company of Texas, which in turn owns the stock of Reliance Standard Life Insurance Company.

Diversified Foods and Seasonings, Inc. identifies its parent corporation and a publicly held company that owns 10% or more of its stock as follows:

> Al Copeland Investments, Inc.

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INTRODUCTION

The Petition for a Writ of Certiorari filed by Mr. Cross fails to present "compelling reasons" which would justify review by this Court of the Court of Appeals unpublished decision. Contrary to the arguments in the Petition, the judgment against Mr. Cross was not the result of the lower courts' failure to follow the law or even the standard of review that was applied. The decision was compelled by the facts of this claim and the governing Plan language.

The dispute in this case is over eligibility for long term disability benefits under an ERISA plan. The Petition first argues that the Fifth Circuit's Decision against Mr. Cross is inconsistent with this Court's holding in *Black & Decker Disability Plan v. Nord*, regarding the weight to be given the opinion of a treating physician. Mr. Cross further suggests that there is a split in the Circuits on this issue. Mr. Cross' arguments lack a foundation of truth. Throughout his Petition, Mr. Cross argues that Reliance Standard did not address or refute the opinions of his doctors. The facts as set forth below prove otherwise.

Mr. Cross initially claimed that he was eligible for benefits because he was physically unable to continue working. However, Mr. Cross now concedes that he was physically capable of continuing to work. Mr. Cross now claims that he is disabled as a result of the potential affects of job stress on his health. However, at the same time he was claiming disability, Mr. Cross was applying for positions with other employers. When asked about this inconsistency by Reliance Standard, Mr. Cross

stated that he was looking for less stressful positions, however, all of the position are identical to the one he left. Now, Mr. Cross argues to this Court that he stopped his job search in early June, before he claims that he became disabled. Again, the facts prove otherwise.

In rejecting the disability claim, Reliance Standard based its decision on the results of objective medical tests, the opinions of two independent doctors and the fact that Mr. Cross looked for other work after complaining about an adversarial supervisor at his job. Because the denial of benefits is based on reliable evidence, the Fifth Circuit's Decision in favor of Reliance Standard is entirely consistent with the Court's holding in *Black & Decker Disability Plan v. Nord*. Also, there is no split in the Circuits regarding the interpretation of *Nord* as argued by the Petitioner. Therefore, there is also no compelling reason why this Court should re-visit an issue that was fully explained just a few years ago.

Contrary to the decision in *Black & Decker Disability Plan v. Nord*, Mr. Cross also asks this Court in his Petition to adopt a presumption that job stress can always be a basis for a disability claim. This is not a legal issue suitable for a Petition. It involves a question of fact that must be examined in the context of an individual claim. What is the specific diagnosis? Who is offering the opinion, a hired expert? Is the person offering the opinion a specialist? What support was given for the opinion, if any? In this case, the opinion relied on by Mr. Cross came from a hired expert who is not a specialist and whose report provides the barest of details and no explanation for the opinions. The decision of the Fifth Circuit was based on the facts, not a question of law.

Finally, Mr. Cross urges consolidation of this appeal with *Metropolitan Life Insurance Company v. Glenn*, No. 06-923. In *Glenn*, the Court is asked to determine the affect of a plan fiduciary's conflict of interest on the judicial standard of review. Mr. Cross argues that the Fifth Circuit did not properly weigh Reliance Standard's conflict of interest when it affirmed the denial of benefits. He is wrong. The Fifth Circuit recognized that as plan insurer and decision-maker, Reliance Standard was operating under a conflict of interest and it weighed the conflict as a factor in deciding whether the Plan's decision was arbitrary and capricious.

The Fifth Circuit correctly rejected many of the arguments raised by Mr. Cross regarding a conflict of interest. Mr. Cross persists in making many of these same arguments to this Court. For example, Mr. Cross argues as evidence of a conflict of interest that Reliance Standard did not send all of his medical records to a doctor who it asked to review the claim. The record confirms that those documents were sent. In fact, Mr. Cross conceded in his Reply Brief to the Fifth Circuit that he was wrong on this point. There are numerous other examples of inaccurate statements by Mr. Cross in his briefs to the Fifth Circuit as well as in his Petition to this Court.

In a case such as this one, the conflict of interest makes no difference at all to the result. A conflict of interest cannot make a "right" decision arbitrary and capricious. While a conflict of interest may tilt the scales in favor of the claimant when the decision is a close call, this is not such a case. Therefore, consolidation with *Glenn* is not appropriate and the decision of the Fifth Circuit should stand.

The Petition of Mr. Cross fails to present compelling reasons why it should be granted. The Fifth Circuit's decision against Mr. Cross was not the result of a misapplication of the law. Instead, it was based on the facts of his claim. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. *The Claim for Benefits*

At the time Mr. Cross stopped working, he was covered under his employer's welfare benefit plan. Reliance Standard insured the Plan's long term disability program and is the Claims Administrator for the disability Plan. To be eligible for benefits under the Plan, a claimant must be unable to perform the material duties of his regular occupation for a minimum of 90 consecutive days. (AR 148, 151).[1] Mr. Cross claims that he became disabled on June 25, 2004.

At the same time that Mr. Cross claims that he became totally disabled, he was actively seeking employment with other companies. (AR 109-128). Mr. Cross began sending out resumes on April 21, 2004. (AR 109-110). He continued to submit resumes through June 2004, including re-sending several resumes on

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[1] The AR references in this Brief are to the documents in the Administrative Record, which are the materials considered by Reliance Standard when it made its decisions on the claim. These materials were filed in the District Court under civil docket item 18. Mr. Cross' Petition also references these documents, but he refers to them as "RA."

June 25, 2004, the day that he claims he could no longer work. (AR 111-112).

While the disability claim was pending, Reliance Standard asked Mr. Cross about his job search. Mr. Cross responded that the jobs he applied for were less stressful than the position he left. (AR 27). This statement is not true. As acknowledged by Mr. Cross on page 4 of his Petition, he was "seeking the same job with another company." Mr. Cross now argues, however, that he stopped sending resumes on June 7, 2004, when he saw a doctor about physical complaints. This statement is also not true. Mr. Cross sent a final resume to a prospective employer on June 22, 2004. (AR 124). He also forwarded some of the previously submitted resumes to someone on June 25, 2004. (AR 111-122). There would be no reason for him to re-send the resumes if he was no longer actively seeking employment.

On June 7, 2004, Mr. Cross last saw a doctor prior to claiming disability. (AR 458). While some symptoms such as fatigue were noted, there was no indication by his doctor that his symptoms had increased or became disabling. The only change noted in the report was that Mr. Cross complained of being "up against a very adversarial supervisor." (AR 458). Of note, Mr. Cross did not see a doctor again until July 26, 2004, more than one month after he stopped working. (AR 267). During that visit, Mr. Cross told the doctor that he was able to walk one and a half miles in 35 minutes. (AR 267). With the exception of a follow up visit on August 4, 2004, Mr. Cross did not see a doctor again until December 7, 2004. (AR 43). Thus, during the 90 day Elimination

Period, when a claimant must be continuously totally disabled, Mr. Cross saw a doctor only two times.

In his Statement of the Case, Mr. Cross refers to a cardiac test that was performed on January 21, 2004. As with other records that he cites to in his Petition, he omits many of the relevant findings. Mr. Cross' blood pressure response to the stress test was normal. (AR 282). He had normal ventricular function with an ejection fraction of 60 percent. The testing was also electrocardiographically negative for ischemia.

Follow-up testing was performed on March 4, 2004.[2] Mr. Cross states that this testing was "borderline positive for myocardial ischemia." See Petition at page 4. This is not entirely accurate. The report actually states "clinically borderline positive for myocardial ischemia *versus deconditioning*." (AR 284). Mr. Cross also fails to state the primary conclusion from the testing of "fair exercise tolerance." He omits the conclusion that the testing was "scintigraphically negative without evidence of stress induced myocardial ischemia," in contrast to the earlier testing which he cites to this Court. Nor does he mention the normal blood pressure response, that he achieved 9.4 METS of activity, and 90 percent of maximum predicted heart rate. (AR 284).

Mr. Cross now claims that physically he could have continued to work but stopped doing so because of

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[2] Mr. Cross refers to this testing as taking place "three months prior to retirement." See Petition at page 4. Throughout his Petition, Mr. Cross refers to June 25, 2004 as his "retirement" date. The Reliance Standard Policy provides disability benefits, not retirement benefits.

potential problems from job stress on his heart condition. See Petition at page 31. This was not the original basis for the disability claim. On page 5 of the Petition, Mr. Cross quotes verbatim from a June 23, 2004 report from his treating doctor. Contrary to the current claim, the doctor stated that Mr. Cross was then physically disabled. (AR 457). In fact, the term "job stress" does not appear at all in the report.

To further evaluate the disability claim, Reliance Standard sent the medical records to Marvin Goldstein, M.D., a Cardiologist. After summarizing the medical records, Dr. Goldstein concluded that Mr. Cross has the ability to work at a light duty occupation, such as his own occupation. (AR 256). Dr. Goldstein based his opinion on the results of the March 4, 2004 stress test. Dr. Goldstein further noted the absence of cardiac changes in June 2004 when Mr. Cross stopped working. Once again referencing the exercise tests, Dr. Goldstein stated that there was no evidence that Mr. Cross exceeded his physical capabilities. Accordingly, Dr. Goldstein concluded that he was not totally disabled.

Based on the medical records, including the report of Dr. Goldstein, Reliance Standard denied Mr. Cross' claim for disability benefits on September 24, 2004. (AR 75-79). On November 8, 2004, Mr. Cross administratively appealed the claim denial. (AR 64). Mr. Cross subsequently withdrew that appeal in order to have additional time to submit records to Reliance Standard prior to a final decision on the claim. (AR 57). Thereafter, Mr. Cross retained an attorney to represent him, an appeal was again requested, and updated medical records were provided to Reliance Standard. (AR 20).

II. *The Administrative Appeal*

According to the administrative appeal documents, despite claiming disability, Mr. Cross did not treat with a doctor for four months between August 4, and December 7, 2004. (AR 43). Also, after he stopped working, Mr. Cross moved to North Carolina to be near his sons and family. (AR 26). In a Declaration submitted with the appeal, Mr. Cross again stated that a "big reason" for his inability to work was the physical requirements of the job – a position he has now abandoned. (AR 26). Mr. Cross also claimed that the stress and pressure of his job affected his medical condition. (AR 26).

On March 3, 2005, Mr. Cross' Cardiologist in North Carolina, Richard Jacoby, M.D., prepared a report in connection with the disability claim. (AR 30). While Dr. Jacoby mentioned certain complaints being made by Mr. Cross, he did not directly state that Mr. Cross was totally disabled. He simply stated that these complaints "would make meaningful employment difficult." (AR 30). Dr. Jacoby made no mention of job stress as a cause of the disability. Moreover, Dr. Jacoby did not treat Mr. Cross until after the 90 day Elimination Period ended and he failed to offer an opinion on his condition during that relevant time.

Dr. Jacoby's March 3, 2005 report also failed to mention a Cardiolite study that was performed on Mr. Cross on January 7, 2005. According to Dr. Jacoby's report from the study, it "was negative with 10 METS of exercise performed." (AR 37). Based on these results, Dr. Jacoby stated prior to March 3, 2005 that it was "safe [for Mr. Cross] to increase his activity." (AR 37).

Through his attorney, Mr. Cross also submitted to Reliance Standard a peer review from William Porter, M.D. (AR 9). Dr. Porter is not a Cardiologist. (AR 11-13). He is Board Certified in Hematology and Internal Medicine. (AR 13). Nor did Dr. Porter identify in his report the medical records that he reviewed before reaching his opinions. (AR 9). Dr. Porter acknowledged that Mr. Cross had a "normal graded exercise test," but stated an opinion that Mr. Cross was nevertheless disabled because of the "adverse effects on the symptoms and progression of coronary artery disease" due to job stress. (AR 10).

The report of Dr. Porter, along with the other medical records, were sent to Jeffrey Caren, M.D., a Cardiologist, for review and comment. (AR 251-254). Contrary to Mr. Cross' statement in his Petition that the opinions of Dr. Porter are "unrefuted," Dr. Caren stated that in patients with obstructive coronary artery disease, there is less than a one percent probability of a coronary event during the following 24 months after a negative Cardiolite study. (AR 253). Based on the functional testing, Dr. Caren concluded that Mr. Cross is "capable working at a light occupation." (AR 254). Therefore, he was not totally disabled.

After considering all of the medical evidence, Reliance Standard notified Mr. Cross on June 16, 2005 that the decision to deny the claim for benefits was upheld. (AR 2-7). The final decision letter identified in detail the medical records that were considered and explained why they did not support the claim for benefits. The letter also referred to the fact that Mr. Cross was applying for jobs with other companies at the time he

claimed that he became disabled. Also, contrary to his statement to Reliance Standard that these were less stressful positions, Reliance Standard pointed out that the positions were identical to the one he previously held. Based on this evidence, Reliance Standard concluded that Mr. Cross failed to sustain his burden of proving that he was totally disabled.

III. *The District Court Decision*

After the final denial of benefits by Reliance Standard, Mr. Cross filed suit under ERISA against the Plan Sponsor and Reliance Standard. Both sides moved for summary judgment and, on April 20, 2007, the District Court entered judgment in favor of the Plan defendants. Mr. Cross timely appealed that decision to the Fifth Circuit.

IV. *The Fifth Circuit Decision*

In an unpublished decision, the Fifth Circuit affirmed the District Court's entry of judgment in favor of Respondents. Because there is language in the Plan that grants to Reliance Standard discretionary authority, the Court reviewed the denial of benefits for abuse of discretion. See Decision at page 6. However, the Fifth Circuit recognized that because Reliance Standard is both the insurer and the decision-maker "it operates under a conflict of interest because it 'potentially benefits from every denied claim.'" See Decision at page 6. Therefore, the Fifth Circuit held that the greater the evidence of a conflict of interest, the less deference it would give to Reliance Standard.

The Fifth Circuit correctly rejected as erroneous many of examples of a conflict claimed by Mr. Cross. For example, as Mr. Cross continues to argue to this Court, he argued to the Fifth Circuit that reliance by the Plan on the report of Dr. Goldstein is evidence of a conflict because the doctor was not provided with all of the treatment records. As stated by Fifth Circuit, "[Mr.] Cross concedes in his reply brief that he was factually incorrect in his original brief in asserting that Goldstein was not provided with the previous opinions of Dr. Sotolongo and Kusnick." See Decision at page 7. Yet he continues to make this admittedly erroneous argument with respect to Dr. Goldstein.

Mr. Cross also argued to the Fifth Circuit that it was evidence of a conflict that Reliance Standard accepted the opinions of Drs. Goldstein and Caren over the opinions of his treating doctors. The Fifth Circuit disagreed, noting that Drs. Goldstein and Caren based their opinions on the objective testing. See Decision at pages 7-8. The Fifth Circuit further concluded that Reliance Standard's rejection of job stress as a basis for the disability claim was not indicative of a conflict of interest because: (a) Mr. Cross applied for similar positions with other companies at the time he stopped working; (b) his blood pressure remained constant and under control both before and after he stopped working; and (c) Mr. Cross only complained about the stress of his specific job based on the adversarial relationship with his supervisor, and not stress from the occupation in general. See Decision at pages 8-9. After considering the true facts and the relevant law, the Fifth Circuit concluded that "Reliance's conclusions were reasonable

and not the result of a conflict of interest." See Decision at pages 9-10. Accordingly, the judgment of the District Court was affirmed.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision is Consistent with *Black & Decker Disability Plan v. Nord*

The decision of the Fifth Circuit does not conflict with the decision of any other Court of Appeals concerning the amount of deference owed to the decision-maker when it refuses to accept the opinions of a treating physician. More important, the decision below does not conflict with this Court's decision on that subject in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). As such, Mr. Cross has not presented "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

In *Nord*, the Supreme Court held that the "treating physician rule" cannot be applied in ERISA cases.[3] The Court explained the holding in *Nord* as follows:

> Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician, but, we hold, courts have no warrant to require administrators automatically to accord special weight to the

[3] The treating physician rule applies in Social Security disability cases and generally requires that more weight is given to the opinions of the treating doctors. *Nord*, 538 U.S. at 829.

> opinions of a claimant's physician; nor may courts impose on plan administrators a discreet burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.

Nord, 538 U.S. at 834.

A. There is No Split in the Circuits over the Meaning of *Nord* and the Fifth Circuit Correctly Concluded that the Denial was Based on Reliable Evidence that Mr. Cross was not Totally Disabled

Mr. Cross suggests that a split in the Circuits exists because, unlike other Circuits, the Fifth Circuit allows a plan fiduciary to ignore a treating physician's opinions and reject them "without specifying cause, or at best, for indefensible reasons." See Petition at page 12. The Fifth Circuit has made no such pronouncement either in this case or any other decision. Nor can it be disputed that if a treating physician's opinion is entirely ignored or a claimant's *reliable* evidence is not given credit, a plan's decision is arbitrary and capricious. *Id.* Those facts do not exist here, however.

The Fifth Circuit's decision in this case does not conflict *Nord*. Nor has Mr. Cross presented any reason why this Court should re-visit the subject of that decision It is evident from his Petition that Mr. Cross simply disagrees with the Fifth Circuit's decision. This does not provide a proper basis for seeking further review by this Court. Equally problematic for Mr. Cross are the numerous misstatements of the underlying facts that are repeated throughout his Petition.

1. *Neither Reliance Standard nor the Fifth Circuit Ignored the Opinions of Mr. Cross' Experts*

In his Petition, Mr. Cross argues that the opinions of his treating doctors were ignored or rejected without Reliance Standard specifying a reason. Clearly, the opinions of Mr. Cross' doctors were not ignored as they were specifically addressed by Drs. Goldstein and Caren and discussed at length in the decision letters. (AR 2-7, 230-233, 254-258). As recognized by the Fifth Circuit, it was reasonable of Reliance Standard to accept the opinions of Drs. Goldstein and Caren over the opinions of the treating doctors because they were based on the objective medical testing and Mr. Cross' own actions in seeking similar positions indicated that *he* did not believe that occupational stress was dangerous to his health. See Decision at pages 8-9.

Dr. Goldstein specifically addressed the opinion of treating physician Dr. Kusnick, who stated that Mr. Cross was disabled in June 2004. In support of his opinion that Mr. Cross could perform light duty work, Dr. Goldstein referred to the March 4, 2004 exercise test in which Mr. Cross performed at 9.4 METS. (AR 256). Dr. Goldstein explained that this capacity translates into an occupational limit of 3.76 METS, which satisfies the demands of a light duty occupation. Dr. Goldstein further commented that there was no evidence of any change in Mr. Cross' condition at or around June 2004 when he stopped working. (AR 256).

Dr. Caren prepared his report at the request of Reliance Standard on April 26, 2005, during the

administrative appeal and after additional medical records were submitted by Mr. Cross. (AR 230). Dr. Caren identified all of the treatment records that he considered, provided a summary of them and then explained why he disagreed with the opinions relied on by Mr. Cross. (AR 230-231). Citing to the March 4, 2004 stress test, Dr. Caren noted that Mr. Cross had average functional capacity for his age. (AR 23). Dr. Caren also responded to the argument first raised by Dr. Porter during the appeal that Mr. Cross was disabled because of the effects of job stress on his future health. Dr. Caren stated that based on the Cardiolite testing, Mr. Cross had a low risk profile for a coronary event during the following twenty-four months. (AR 231-232).

It is worth comparing the detailed reports by Drs. Goldstein and Caren with the opinions relied on by Mr. Cross.[4] Mr. Cross first relies on the June 23, 2004 report from Dr. Kusnick. Dr. Kusnick stated that Mr. Cross was in physical decline and had an increase in objective symptoms. (AR 457). In contrast, the most recent stress test revealed fair exercise tolerance, an ejection fraction of 55% with no wall motion abnormalities and a normal blood pressure response. (AR 284). Nor did the sparse treatment notes around the time Mr. Cross stopped working document any increase in symptoms.

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[4] Mr. Cross argues in his Petition that it was arbitrary and capricious for Reliance Standard to obtain these medical reviews after it received a report from a Nurse. It cannot be wrong to obtain opinions from specialists, especially when the claimant subsequently provides updated medical records and a new opinion from an expert.

Next, Mr. Cross relies on a March 3, 2005 report from Dr. Jacoby. Dr. Jacoby only described Mr. Cross' condition in March 2005, and not in very much detail. (AR 30). Dr. Jacoby offered no opinion on whether Mr. Cross was totally disabled for 90 consecutive days after June 25, 2004, the standard under the Plan. Nor did Dr. Jacoby even state with certainty that Mr. Cross was disabled in March 2005. He only stated that his claimed limitations "would make meaningful employment difficult." (AR 30).

Significantly, while Mr. Cross accuses Reliance Standard of disregarding the opinions of Drs. Kusnick and Jacoby, it is he who has now abandoned them. Dr. Kusnick offered an opinion that Mr. Cross was physically unable to work in June 2004. (AR 457). Read liberally, Dr. Jacoby believed that Mr. Cross was physically disabled at some point. (AR 30). Mr. Cross no longer bases his claim on those opinions. Mr. Cross concedes "that he could have physically performed the requirements of his job" after he stopped working. See Petition at pages 19-20.

Mr. Cross argues on page 19 of his Petition that "the essential basis for his disability is the stress associated with his position" and that this is the finding of the treating Cardiologists. This was obviously not the opinion of Dr. Kusnick or Dr. Jacoby. It is only Dr. Porter who espoused this opinion and he is not a Cardiologist.

Relying on a report by Dr. Porter, Mr. Cross argued to Reliance Standard that job related stress would adversely affect his medical condition and was the cause of his claimed disability. (AR 9-10). Unlike the detailed

reports of Drs. Goldstein and Caren, Dr. Porter did not identify any of the medical records he reviewed to arrive at his opinion. (AR 9-10). Dr. Porter did not explain how the objective testing supported his opinion. He also failed to identify any support in any medical journal for his opinion that job stress can adversely affect the progression of Mr. Cross' specific medical condition.

The reports of Drs. Goldstein and Caren provided Reliance Standard with "reliable evidence" that contradicted the medical opinions relied on by Mr. Cross. *See Nord*, 538 U.S. at 834. Therefore, there is no basis for the argument on page 19 of the Petition and elsewhere that the opinions of his three doctors "are unrefuted by any medical source" or were ignored. In the final decision letter, Reliance Standard discussed at length the records and opinions of Mr. Cross' experts. (AR 3-4). Addressing Dr. Porter's opinion that job stress would make it more difficult to control his hypertension, Reliance Standard cited to the treatment records which showed that Mr. Cross' blood pressure remained relatively constant both during the time and after he stopped working. (AR 4). Reliance Standard also referred to the results of the March 4, 2004 stress test, which showed an average functional capacity for his age, and the opinion of Dr. Caren based on that testing that Mr. Cross had a low risk profile for a future cardiac event. (AR 4).

Reliance Standard also explained in its decision letter that the claim of disability based on job stress was inconsistent with his application for similar jobs with other companies. (AR 5). Responding to Mr. Cross' statement that the other positions were "lighter or less

stressful" than his current occupation, Reliance Standard noted that they were in fact identical occupations, a position that Mr. Cross now does not dispute. (AR 5). Based on the above, it is quite a stretch for Mr. Cross to argue in his Petition that Reliance Standard's decision offered no reasons and that the opinions of his doctors are not refuted. Having cited to reliable evidence in the record, Reliance Standard had no duty to further explain why it disagreed with the opinions of the treating physicians. *Nord*, 538 U.S. at 834.

B. Mr. Cross Waived any Argument that the Fifth Circuit Did Not Consider All of the Factors Identified in *Nord* by Failing to Raise The Issue In the Lower Courts

In this section of his Petition, as he does elsewhere, Mr. Cross simply quotes from various cases, without explaining how these decisions support his extraordinary request that this Court grant Certiorari. This is especially true of his discussion of *Nord* on page 15 of the Petition. Mr. Cross quotes from that portion of the decision in which the Court observed that a doctor who is repeatedly retained by a plan may have an incentive to find that a claimant is not disabled so that the doctor is retained in future cases. *See Nord*, 538 U.S. at 832. The Court identified other factors that may be considered when a court weighs conflicting medical opinions such as the length of the relationship with the patient and relative expertise of the physicians. Mr. Cross had the opportunity to present evidence on these subjects to both the District Court and the Court of Appeals but failed to do so. It is too late to raise these

issues for the first time in a Petition for a Writ of Certiorari. *Glover v. United States*, 531 U.S. 198, 205 (2001).

Even if Mr. Cross did not waive these arguments as he did, the evidence that is in the Administrative Record on these subjects does not support any of the arguments being made by Mr. Cross. There is no evidence that Dr. Caren provided a medical opinion to Reliance Standard other than the one on this claim. It is also noteworthy that Reliance Standard did not directly retain Dr. Caren. He was hired by an outside consultant. (AR 251). Looking to the doctors' credentials, unlike Drs. Goldstein and Caren, Dr. Porter is not a Cardiologist. (AR 13). He is a Hematologist and Internist. These facts demonstrate that Reliance Standard's rejection of Dr. Porter's opinions is consistent with *Nord*.

Review of the concluding paragraph in this section of the Petition shows that Mr. Cross is not raising an issue that warrants further review by this Court. He simply disagrees with the conclusion reached by the Fifth Circuit. In arguing that his doctors' opinions were never considered or refuted by Reliance Standard, Mr. Cross ignores the decision letters issued by Reliance Standard, the detailed reports prepared by Drs. Caren and Goldstein as well as his own basis for claiming benefits. Therefore, the first basis for the Petition should be rejected.

II. The Presumption of Disability Advocated by Petitioner Is Contrary to the Holding in *Nord* and Ignores the Varying Facts in Individual Claims

In the next section of his Petition, Mr. Cross asks the Court to adopt a rule recognizing job stress as a basis for an ERISA disability claim. See Petition at page 25. While no one would dispute that a condition such as a coma would automatically render a person disabled, a cardiac condition is quite different. There are many different types of heart conditions and varying levels of disease. There is no medical support in this record for a *per se* rule as advocated by Mr. Cross. As in *Nord*, this is an attempt to place an unwarranted presumption in an ERISA claim.

A. The Fifth Circuit Rejected Mr. Cross' Argument For Coverage Based on the Facts, not the Law

Contrary to Mr. Cross' argument, the Fifth Circuit did not reject out of hand the possibility that a claimant could be totally disabled based on the potential effects of stress on a medical condition. The Fifth Circuit only concluded that Mr. Cross failed to prove his claim for benefits on this basis. After considering the evidence in the Administrative Record, the Fifth Circuit concluded that Reliance Standard's rejection of Mr. Cross' claim based on job stress was not the result of a conflict of interest, nor was it arbitrary and capricious. See Decision at pages 8-9. The Court identified several facts supporting this conclusion. See Decision at pages 8-9. First, the Court agreed with Dr. Goldstein that the stress tests provided objective criteria to evaluate

Mr. Cross' cardiac condition. Also, contrary to Dr. Porter's opinion that job stress had an adverse effect on Mr. Cross' hypertension, there was no change in his blood pressure after he stopped working. Next, the Fifth Circuit observed that the only job stress complained of by Mr. Cross was specific to his job and concerned his supervisor whereas the Plan provides a benefit in the event of a disability from a claimant's "occupation," not his specific job. Further supporting the Court's conclusion that any stress was specific to his job, the Court observed that Mr. Cross sought similar positions with other employers at the time he stopped working.

In an earlier decision by the Fifth Circuit, the Court also rejected a disability claim based on job stress, but this was also based on the facts presented. *See Gooden v. Provident Life & Acc. Ins. Co.*, 253 F.3d 329 (5th Cir. 2001). There are many common facts shared by Mr. Cross and the claimant in *Gooden*. The most recent stress test performed on Mr. Gooden was within normal limits. His treating doctor failed to identify any change in his condition at the time he stopped working. Similar to the evidence in this claim that Mr. Cross continued to look for other work, the claimant in *Gooden* was laid off before he submitted his claim. Mr. Gooden also argued that the Plan "failed to appreciate" his doctor's concern for the effects of job stress. Based on the objective testing and the facts surrounding the claim, the Fifth Circuit concluded that the denial of benefits was not an abuse of discretion. Nowhere in *Gooden* did the Fifth Circuit state that a claim based on job stress can never succeed. As in this case, the Court only held that the claimant failed to sustain his burden of proof.

Even the case relied on by Mr. Cross in his Petition demonstrates that a *per se* rule should not be applied and each claim for benefits must be decided on its own set of facts. In support of his argument, Mr. Cross primarily relies on and quotes extensively from the District Court decision in *Lasser v. Reliance Standard Life Ins. Co.*, 146 F.Supp. 2d 619 (N.J. 2001).[5] In *Lasser*, the defense expert did not address the issue of occupational stress. The claimant also presented evidence that for his particular heart condition, which differs from Mr. Cross' condition, stress posed a real risk of harm. Therefore, while job stress may have been a legitimate concern in *Lasser*, there is no such evidence in the claim of Mr. Cross.

In this section of his Petition, Mr. Cross again argues in error that his doctors' opinions regarding the effects of stress were neither addressed nor refuted by Reliance Standard. See Petition at page 32. Plato is quoted as having said that "there is no harm in repeating a good thing."[6] However, repeating a falsehood will not make it either true or good. The numerous times that Mr. Cross repeats his mistake simply reinforces the Petition's lack of merit.

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[5] *Lasser* pre-dates this Court's decision in *Nord*. This same is true of the other cases relied on by Mr. Cross on page 30 of his Petition.

[6] The Columbia World of Quotations (Columbia University Press, 1996), available at *www.Bartleby.com\br.66.html* (last visited May 21, 2008).

B. Petitioner Relies on Improper Evidence in the Petition

Mr. Cross attempts to bolster his arguments regarding job stress by referring this Court to a 2007 medical journal article and the affidavit he submitted to this Court. Obviously, this evidence was not before Reliance Standard when it made its decision on the claim years earlier. A denial of benefits cannot be considered arbitrary and capricious for not considering evidence that was never before the Plan. It is for this reason that the Fifth Circuit and every other Circuit has held that a Court's review is limited to the administrative record when the deferential standard of review applies. *See Vega v. Nat'l Life Ins. Servs. Inc.*, 188 F.3d 287, 299 (5th Cir. 1999). *See also Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 518 (1st Cir. 2005); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 440 (3d Cir. 1997); *Elliott v. Sarah Lee Corp.*, 190 F.3d 601, 608 (4th Cir. 1999); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990); *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (7th Cir. 1999); *Maune v. I.B.E.W., Local No. 1, Health & Welfare Fund*, 83 F.3d 959, 963 (8th Cir. 1996); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 823-24 (10th Cir. 1996); *Jett v. Blue Cross & Blue Shield of Ala.*, 890 F.2d 1137 (11th Cir. 1990). Based on this law, the new evidence relied on by Mr. Cross cannot be considered.

III. The Conflict of Interest Analysis by the Lower Courts Did Not Determine the Result – the Facts Led to the Decisions Against Coverage

Mr. Cross would like to get another bite at the apple before the District Court. For this reason, he argues that his Petition should be consolidated with *Metropolitan Life v. Glenn,* a case in which the Court is considering the effect of a conflict of interest on the standard of review in ERISA cases and in which the Court heard oral argument on April 23, 2008.[7] For many reasons, consolidation with *Glenn* is unwarranted.

Mr. Cross concedes in his Petition that the Plan grants to Reliance Standard discretionary authority to determine eligibility for benefits. This language is plainly stated in the Plan documents.[8] However, because Reliance Standard both insures the Plan and is responsible for making benefit decisions, the Fifth Circuit recognized that it "potentially benefits from every denied claim." See Decision at page 6. Accordingly, the Fifth Circuit gave less deference to Reliance Standard's decision and considered other evidence of a conflict of interest raised by Mr. Cross when deciding the amount of deference owed to Reliance Standard. See Decision at pages 6-7. While the Fifth Circuit rejected many of the arguments raised by Mr. Cross,

---

[7] No. 06-923.

[8] "Reliance Standard Life Insurance Company shall serve as the claims review fiduciary with respect to the insurance policy and the Plan. The claims review fiduciary has the discretionary authority to interpret the Plan and the insurance policy and to determine eligibility for benefits." (AR 155).

this was because they were contrary to the facts, not because the Court failed to take into consideration any conflict on the part of Reliance Standard.

A. The Fifth Circuit Properly Weighed Any Conflict as a Factor in Deciding Whether the Denial of Benefits Was Arbitrary and Capricious

Mr. Cross identifies his evidence of a conflict on page 34 of his Petition. There are good reasons for the rejection of these arguments by the Fifth Circuit. Mr. Cross argues that Reliance Standard failed to provide Dr. Goldstein with records from Dr. Sotolongo. However, he admitted in the Fifth Circuit briefing that this statement was wrong as those records are clearly identified in Dr. Goldstein's report. (AR 255). He accuses Drs. Goldstein and Caren of inaccurately describing the March 2004 stress test as "negative." Dr. Goldstein was quoting directly from the report when he stated that the test was "negative without evidence of stress induced myocardial ischemia" (AR 255, 284).[9] Dr. Caren also did not describe the March 4, 2004 stress test as "negative" as claimed by Mr. Cross. He described the testing as showing "an average functional capacity for age, with symptoms at peak exercise." (AR 254). This accurately summarizes the test report conclusions. (AR 284). The criticism by Mr. Cross of the doctors' choice of words is also curious based on his own doctor's statement that the January 7, 2005 stress test "showed a normal ejection fraction and no wall motion abnormalities." (AR 9).

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[9] This testing also contradicts the argument by Mr. Cross that the evidence "actually supports a limitation to sedentary work."

Without citing to any source, Mr. Cross next argues that Reliance Standard told the doctors who reviewed the medical records at its request "the functional capacity required to deny benefits." While Reliance Standard asked the doctors if the medical records supported an impairment from light duty work, how else could the doctors comment on the question of disability if they did not know the exertional level required of Mr. Cross' occupation? (AR 260). Mr. Cross also ignores another question that was posed by Reliance Standard. Reliance Standard asked whether Mr. Cross "[could] have been working beyond his means given his medical condition." (AR 260). This can hardly be considered a leading question.

In this section of his Petition, Mr. Cross returns to his erroneous argument that Reliance Standard never addressed his claim based on job stress. Clearly, it would have been wrong, let alone arbitrary and capricious, for Reliance Standard not to address a claim that is raised. However, the record demonstrates that Dr. Caren considered the issue of job stress after it was raised for the first time by Dr. Porter, and it was also fully addressed by Reliance Standard in its final decision letter. (AR 4-6, 253-254).

Contrary to what Mr. Cross would have this Court believe, the denial of benefits by Reliance Standard had nothing to do with a conflict of interest. Nor was the outcome of this case in the District Court or the Fifth Circuit determined by the standard of review. The facts led to the undeniable conclusion that Mr. Cross was not totally disabled. Originally, Mr. Cross claimed that he was physically unable to continue working past June 25,

2004. He now admits that he was physically able to continue working in June 2004. During the appeal, Mr. Cross claimed for the first time that his disability was based on job stress. Why, then, did he apply for other similar jobs through the time he stopped working? And for all of his criticism of the Cardiologists who reviewed the records at the request of Reliance Standard, he ignores the fact that he relies on a non-examining doctor who is not a specialist in his condition, he does not identify any of the records on which he relied and he provides absolutely no support for his opinions. Under these facts, it is difficult to imagine how any decision in *Glenn* can alter the outcome here.

CONCLUSION

The Petition of Mr. Cross fails to establish any compelling reasons why this Court should grant Certiorari. Therefore, it is respectfully requested that the Petition be denied.

Respectfully submitted,

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No. 071274

IN THE

Supreme Court of the United States

ARTHUR "SKIP" CROSS

Petitioner

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY and DIVERSIFIED FOODS, INC.

Respondent

REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

ARGUMENT

I. The Fifth Circuit should have, but did not, employ a less deferential review.

Reliance states (p.24) that, due to the acknowledged conflict of interests, "the Fifth Circuit gave less deference to Reliance Standard's decision...." But, in fact, the Fifth Circuit held:

> Contrary to Cross's argument, the administrative record **does not show a strong conflict of interest necessitating a less deferential review.** (Emphasis supplied)

Thus, despite the arbitrary rejection of treating physician opinions, **no less deferential review was undertaken**. Apparently, merely on the basis of defendant's dual role as administrator and payor of benefits, this finding is now erroneous under *Metropolitan Life Insurance Co. v. Glenn*, No. 06-923 (U.S. 6/19/2008) (2008 WL2444796) (hereinafter *Glenn*), which held:

> We here decide that this dual role creates a conflict of interest; that a reviewing court **should** consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; (emphasis supplied)

But the primary questions before the Court are (1) whether Reliance did "arbitrarily refuse to credit a

claimant's evidence, including the opinions of a treating physician" as prohibited by *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), and (2) whether such arbitrary refusal constitutes abuse of discretion and/or denial of "full and fair review" such as to require reversal.

II.A. Reliance arbitrarily refused to credit Mr. Cross's evidence, including the opinions of treating physicians.

Reliance argues that the opinions of the treating physicians and, presumably, plaintiff's other reliable evidence, **was** considered and, hence, was not arbitrarily rejected. Plaintiff urges that some opinions were not even considered and that, for the remainder, no reasons or indefensible reasons were given for their rejection.

In "Reasons for Denying the Petition" I.A. "There is No Split in the Circuits," Reliance states:

> In his Petition, Mr. Cross argues that the opinions of his treating doctors were ignored or rejected without Reliance Standard specifying a reason. Clearly, the opinions of Mr. Cross' doctors were not ignored as they were specifically addressed by Drs. Goldstein and Caren and discussed at length in the decision letters. (AR 2-7, 230-233, 254-258).

In fact, neither Dr. Goldstein nor Dr. Caren make any mention of the opinions of any of the treating

physicians, except that Dr. Caren lists the June 23, 2004 letter of Dr. Kusnick among the documents reviewed. Reliance carefully does not argue that it specified cause for rejecting those opinions. Nor does Reliance quote any portion of the reports of Drs. Goldstein and Caren nor of the decision letters to support its contention that reasons were offered for the rejection of these opinions, except to argue (p.17) that Dr. Porter was wrong to opine "that job stress would make it more difficult to control (Mr. Cross') hypertension." This was addressed by petitioner at p.23. Petitioner urges this reasoning as "indefensible."

Apparently, Reliance interprets the *Nord* prohibition as satisfied if *some* of the opinions are *considered*. Petitioner urges that *Nord* requires a *rationale* for rejecting *all* such opinions, so that reviewing courts can determine whether they were rejected arbitrarily.

Reliance flatly states (p.14), "Dr. Goldstein specifically addressed the opinion of treating physician Dr. Kusnick, who stated that Mr. Cross was disabled in June 2004." Review of Dr. Goldstein's report (Appendix A) shows that nowhere does he even mention Dr. Kusnick's opinions, nor does he even indicate that the June 23, 2004 letter of Dr. Kusnick was received by him. There is no mention of Dr. Sotolongo's April 3, 2002 Attending Physician statement, in which he lists the symptoms and objective findings and states that Mr. Cross was "incapable of clerical or administrative (sedentary) activity" and notes stress "with production" (R.A., p.

462).[1]

> Reliance then states, at p. 15:
>
> Dr. Caren identified all of the treatment records that he considered, provided a summary of them and then explained why he disagreed with the opinions relied upon by Mr. Cross (AR 230-231). (Appendix B)

Reliance is correct that Dr. Caren listed the treatment records provided him, which specifically did include the June 23, 2004 "Physician's Statement" of June 23, 2004 (but not apparently the letter of the same date of Dr. Kusnick), and provided a summary of Mr. Cross's procedures, tests and complaints. But nowhere does he even mention Dr. Kusnick's opinions except to acknowledge the receipt of one, nor does he even indicate that the Attending Physician's statement of Dr. Sotolongoto was received by him. Nowhere does he otherwise mention the opinion of Dr. Jacoby that his limitations "would make meaningful employment difficult" (R.A., p. 36). Nor does he otherwise mention Dr. Porter's statement:

> Based on my review, I conclude, as have all the cardiologists who have treated him, that Mr. Cross is totally and permanently disabled for any occupation...." (R.A. p.9)

---

[1]As Reliance notes, plaintiff concedes that Dr. Goldstein was supplied some, but not all, of Dr.Sotolongo's records.

Defendant urges other reasons for rejecting the opinions of Mr. Cross's physicians. Whatever the dubious significance of these arguments, they are the *post-hoc* arguments of counsel. The burden was on defendant to explain why it rejected these opinions, not for counsel to do so before the Supreme Court. As the circuit court noted in *Glenn v. Metlife*, 461 F.3d 660 (6th Cir. 2006), " the court's role is to review the basis for the decision that was actually made by the plan administrator...."

Finally, neither Reliance in its decisions, nor its consultants, nor Reliance in its Brief in Opposition, mentions the opinion of Dorothy V. McGarry R.N., B.S.N., C.R.R.N. that Mr. Cross is incapable of performing more than sedentary work, which would preclude his past work (R.A. p.261). This though the file was submitted to her by Reliance for her opinion and though she certified that she has "the training and experience in the area of nursing practice encompassed in this review." Reliance cannot now complain that the opinion they sought does not constitute "reliable evidence."

II.B Arbitrarily rejecting Mr. Cross's reliable evidence should constitute reversible error.

At pp. 17-18, Reliance appears to offer its defense. Reliance cites the opinions upon which it based its decision and urges that this constitutes the basis for rejecting a claimant's apparently "reliable evidence." Reliance states (p.17):

The reports of Drs. Goldstein and Caren

> provided Reliance Standard with "reliable evidence" that contradicted the medical opinions relied upon by Mr. Cross. Therefore, there is no basis for the argument on page 19 of the Petition and elsewhere that the opinions of his three (sic) doctors "are unrefuted by any medical source"[2] or were ignored.

In other words, Reliance urges that it need not actually explain why a claimant's evidence is not reliable. It need merely show that there is a basis for its decision, and such factors as length of treatment, expertise, frequency of treatment, relative supportability, relative consistency, failure to consider stress, *etc.* need not be **weighed** in evaluating conflicting opinions. This appears to be inconsistent with the holding in *Nord*, which explains that the "treating physician rule" is not necessarily prudent in ERISA claims because:

> [T]he assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks.

---

[2] Petitioner was specifically referring to job stress, which was not mentioned by Drs. Goldstein and Caren.

This statement appears to imply that length of treatment and expertise, at least, are factors that should be considered. Whether administrators must weigh such factors in choosing between competing medical opinions is the issue the Supreme Court is asked to address.

In *Glenn*, the Supreme Court analogized ERISA cases to those arising under trust and administrative law, noting that such cases "ask judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by **weighing** all together." (emphasis supplied)
Petitioner urges that such weighing applies to all medical opinions and requires an explanation of the result

It is now up to the Court to determine whether, when it said in *Nord* that such administrators "may not" do so, it meant, as the Third, Fourth, Sixth and Ninth Circuits hold, "may not," or whether, as the Fifth Circuit has effectively held, it meant "should not, but it is permissible."

In *Audler v. Astrue*, 501 F.3d 446 (5th. Cir., 2007), the Fifth Circuit held:

> [T]he ALJ offered nothing to support her conclusion at this step and because she did not, "we, as a reviewing court, simply cannot tell whether her decision is based on substantial evidence or not."

The same principle should apply herein.

Reliance urges that even reporting the opinions of a claimant's sources satisfies the prohibition against arbitrary rejection of that opinion (p.17). Plaintiff urges that a reasonable explanation for the rejection is necessary for a reviewing court to tell whether that rejection is based on substantial evidence or not.

III. It was reversible error for Reliance to ignore the "common care and prudence rule."

In. *Glenn*, the Supreme Court said:

> The Court of Appeals ultimately set aside MetLife's denial of benefits in light of a combination of several circumstances:...(5)
> MetLife's failure to take account of evidence indicating that stress aggravated Glenn's condition. (p.6)
>
> ...
>
> All these serious concerns, taken together with some degree of conflicting interests on MetLife's part, led the court to set aside MetLife's discretionary decision. See *id.*, at 674-675. We can find nothing improper in the way in which the court conducted its review. (p. 15)

Hence, though the *Glenn* court did not specifically address the "common care and prudence rule," plaintiff urges that it has tacitly approved the doctrine.

Most of Reliance's arguments address Mr.

Cross's attempts to work against medical advice until the day before he gave up and retired. Reliance has beguiled the Fifth Circuit panel into dismissing the "common care and prudence rule" because Mr. Cross was loath to accept the advice of his cardiologists and stop working.

Temporarily convincing himself that working as sales manager for another employer would not cause job stress, and planning to continue to sacrifice his health for money, he sent out resumes, obviously hoping to move seamlessly from one job to another. Any offers he might have received do not appear in the record. Obviously, after realizing (R.A.-p.24), "This relentless drive to increase sales and cut costs would be typical with any major company," he made his final decision and contacted Dr. Kusnick, who sent a letter the same day confirming plaintiff's disability. No resumes were sent by Mr. Cross on or after June 23, 2004.

It should be noted that no physician advised him to find a different employer. They all found him disabled, period.

Reliance, and the Fifth Circuit, urge that Mr. Cross's medical opinion as to whether he could safely continue to work is paramount. The proposed rationale is that he thought he could work for another employer. Even had he thought so before he retired, he obviously did not think so from the time he retired forward, for, as indicated by his *forma pauperis* application to the Fifth Circuit, he never returned to any work and is supported by Social Security disability benefits. Thus

Mr. Cross went from a six-figure job to a pauper. Reliance and the Fifth Circuit apparently believe that, on retirement, he still felt, and feels, that he could do other work but has been holding back ever since, putting his money on the proposition that Reliance, the Fifth Circuit or the Supreme Court would reverse the decision of the District Court. Mr. Cross urges that he knows the odds. If Mr. Cross's opinion on "common care and prudence" has any value, it would be limited to his opinion when and after he retired, not while he was still working.

Reliance argues (p.7, 16) that the treating physicians did not relate stress as a factor in Mr. Cross's disability, specifically citing Dr. Kusnick's letter of June 23, 2004. In fact, Dr. Kusnick did not, in that letter, make **any** statement whatever as to what aspect of plaintiff's job would have the most deleterious effect on him (R.A., p. 457). But in his previous visit, on June 7, he noted "severe excess work stress" (R.A. p. 458).

Moreover, Dr. Sotolongo said, "My recommendation to him is that he retire as I think his work is bringing on a significant amount of stress in his life." (R.A. p. 292). And Dr. Porter said:

> The assessment of prognosis for Mr. Cross's several medical problems requires that the role of job stress, and its known adverse effects on the symptoms and progression of coronary artery disease, be taken into account. This assessment is necessarily subjective, but no less

> important, than the results of an exercise test...Job-related stress would make his hypertension more difficult to control, which in turn would hasten the progression of his coronary artery disease and increase the risk of more cerebral infarctions and brain damage." (R.A., p. 10)

Of course, whether because of the effects of stress or physical functioning, all of Mr. Cross's physicians and Dorothy V. McGarry, R.N., B.S.N., C.R.R.N. found Mr. Cross to be disabled, and Reliance arbitrarily rejected their opinions.

Reliance also repeatedly states (p.7, 8, 16) that Mr. Cross "has now abandoned" his contention that the physical requirements of his job are a factor in his disability and that he "concedes 'that he could have physically performed the requirements of his job' after he stopped working." (p.16)

First, Mr. Cross stated in his petition, "Petitioner has stipulated that he could have physically performed the requirements of his job on the day after he retired, **but only if the effects of such continued work are not a consideration.**" (Emphasis supplied) In focusing exclusively upon Mr. Cross's physical ability to perform his job no matter the consequences, Reliance apparently continues to argue against the "common care and prudence" rule.

As to Mr. Cross's abandoning of the deleterious effects of the physical requirements of his job, he has

done no such thing (Petition, p. 19 (malevolent influence), p. 24 (petitioner's conditioning), p.33 (items 1, 2, 3). Spatial limitations merely require Mr. Cross to choose his battles. The second basis for Mr. Cross's petition is the utter failure of Reliance to consider the effects of stress, and it is this argument he addresses.

Conclusion

The Fifth Circuit has essentially held that Reliance had a basis for its conclusions without having to bother to evaluate and reject Mr. Cross's evidence. And Reliance has discretion. End of story.

The Ninth Circuit, in *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir., 2006) , reversed the trial court's decision because:

> [T]he district court declined to decide whether or not a waiver of premium application was submitted to Alta's predecessor on behalf of Dr. Abatie. Instead, the court reviewed the evidence both supporting and undermining Plaintiff's claim that a waiver application had been submitted. The court appeared to conclude simply that **the administrator did not abuse its discretion because there was evidence on both sides of the issue**. (Emphasis supplied)

In the Fifth Circuit, arbitrary rejection of a claimant's reliable evidence doesn't even activate a

reduction in discretion. In the Third, Fourth, Sixth and Ninth Circuits, it constitutes reversible error.

Petitioner is aware that the *Glenn* court eschewed articulation of specific rules. For Chief Justice Roberts, this threatens to allow *de novo* review of every case in the Ninth Circuit. But in the Fifth Circuit, it means that claimants can point to no specific errors to justify reversal.

There are some rules that must be basic to any fair determination, and explaining the weight given to the evidence and the rationale therefor must be one of them. And this protection must be available to plaintiffs in the Fifth Circuit as well as those in other Circuits.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL BRIANSPURLOCK
Attorney for Petitioner
DATE: July 1, 2008

APPENDIX A:

RELIANCE STANDARD LIFE INSURANCE COMPANY

ARTHUR CROSS
Claim NO: 2004-189-069
Policy No: LSC 104498-2
Date: 11 September 2004

This 56 year old man's disability claim has been sent to me for my review and response to several questions posed by Mr. Rob Loy (9/8/04). The medical records for this claim come from two sources, i.e., Dr. Carlos Sotolongo (cardiologist, 4/19/94 through 5/16/02) and Dr. Barry Kusnick (cardiologist, 2/19/03 through 8/4/04). I will summarize the essential features of this cardiac claim first, and then provide my answers and the explanations for them.

This gentleman had a congenital bicuspid aortic valve recognized as a youngster" which finally required an aortic valve replacement (Starr-Edwards), "in June 1982." This required chronic anticoagulation therapy, which has been done, and serial echocardiograms (2/14/00 through 3/4/02 studies available) confirm a satisfactory peak and mean gradient, as well as normal left ventricular size and left ventricular ejection fraction. "Mild concentric hypertrophy," first reported on 5/4/94, has also persisted.

On 4/19/94 hypertension was first detected (with initiation of specific therapy on 5/4/94), and, after a negative exercise test ("last summer." 4/3/96), coronary artery disease was established in October 1998. This diagnosis has led to a series of exercise and/or pharmacologic stress test (10/20/98, 10/27/98, 5/8/00, 3/4/02, 2/7/03, 2/4/04, and 3/4/04), and, in connection

with monitoring of his aortic valve replacement, a series of echocardiograms (2/14/00, 3/12/01, and 3/4/02 available records), as well as serial cardiac catheterizations (11/11/98, 5/17/00, 3/11/02, and 2/20/03), all reflecting the recurrent, episodic exacerbations of his coronary artery disease. Concurrent with these studies, the client has had percutaneous coronary interventions (angioplasty and/or stenting) in November 1998 and May 2000, and then coronary artery bypass graft (left internal mammary artery to the left anterior descending coronary artery, radial artery to diagonal) in February 2003. It is of somo-importance that one may summarize the pertinent findings from this extensive serial testing to document: (a) he has consistently performed between 6 to 8 minutes on a Bruce Protocol exercise test, last on 3/4/04, 7 minutes, 30 seconds at 90% of maximum predicted heart rate, achieving 9.4 NETS, with a "borderline" EKG response and "negative without evidence of stress induced myocardial ischemia," and (b) by echocardiography and/or isotope studies, he has maintained a normal left ventricular ejection fraction of 60 plus/minus percent (and no definite evidence of any myocardial infarction).

With this objective data review based summary, I will now address the questions:

1. I believe these records do support the client's ability to perform a light duty occupation. The last exercise test 3/4/04 established his 9.4 MET capacity, and in accordance with standard cardiac

rehabilitation criteria ([1] [2]) this would equate to an occupational limitation of 3.76 METS. This in turn satisfies the demands for a light duty category (see attached photocopies). Although Dr. Kusnick saw the client twice after the 3/4/04 testing (6/7/04 and 7/26/04), he has not requested any such testing again.

2. I see no evidence of any cardiac change in or around 2004. I would note that on 8/1/01 (Dr. Sotolongo) it was reported, "he is walking...at a pace of about a 15 minute mile," and on 7/20/04, Dr. Kusnick described he "walked 1-1/2 miles in 35 minute; the latter would approximate to three miles in one hour and this (see attached photocopy) is "Physical Conditioning" commensurate with "Category Light 3-5 METS" occupational" status.

3. By reference to the serial exercise tests, I see no evidence that the client ban exceeded his demonstrated physical capacity in the past (except for those episodes requiring active therapy intervention for exacerbations of his coronary artery disease), nor would he be required to do so currently.

s/ Marvin Goldstein, M.D.

MG:at
Attachments

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[1] Twentieth Bethesda Conference: Insurability and Employability of the Patient with Ischemic Heart Disease, Journal American College of Cardiology; 14:4, October, 1989; 1004-1044

[2] Clinical Cardiac Rehabilitation, edited by Paskow and Defoe, Second Edition, 1999.

APPENDIX B:

Jeffrey F. Caren, M.D., F.A.C.C.

Cedars-Sinai Medical Towers
8635 West Third Street, Suite 890W
Los Angeles, California 90048
(310) 659-0714 fax (310) 659-0664

American Board of Internal Medicine — Qualified Medical Evaluator

AIBM, Cardiovascular Diseases — Agreed Medical Evaluator

Patricia Wallace LPN
IME Coordinator
United Review Services
67 Walnut Avenue
Suite 405
Clark, New jersey 07066

Claimant: Arthur Cross
Insurance Co: Reliance Standard Life Insurance
Adjustor: Barbara Finnegan
Ins. File: 2004-189-069
URS File: P67779
Review Type: Cardiac Peer Review

CARDIAC PEER REVIEW

Dear Ms. Wallace,

Thank you for your request that I provide a

cardiac peer review of the above captioned patient's medical file. I have carefully reviewed the following documents:

1. Cardiac Catheterization, Carlos M. Sotolongo, MD, November 11, 1998
2. Cardiac Catheterization, Carlos M. Sotolongo, MD, May 17, 2000
3. Cardiology progress notes, Carlos M. Sotolongo, MD, April 19, 1994 through April 18, 2002
4. Lakeview Regional Medical Center, Hospitalization, February 19 — 26, 2003
5. Adenosine Cardiolite Stress Test, February 4, 2004
6. Cardiolite Stress Test, March 4, 2004
7. Physician's Statement (Reliance Standard Life Insurance Co) Barry N. Kusnick, MD, FACC, June 23, 2004.
8 Medical Progress Notes, Barry N. Kusnick, MD, June 6, 2003 through July 26, 2004
9. Disability Evaluation, Marvin Goldstein, MD, September 11, 2004
10. Denial of Benefits Letter, Reliance Standard Life Insurance Co., September 24, 2004
11. Carotid Artery Duplex Ultrasound Report, December 15, 2004
12. Echocardiogram Report, December 15, 2004
13. Cardiology Progress notes, Richard M. Jacogy, MD, FACC, January 21, 2004 through March 3, 2005
14. Declaration of Arthur Lee Cross, Jr., March 10, 2005
15. Independent Medical Examination William G. Porter, MD, Match 16, 2005

History of Illness:

Arthur Cross is 56-year-old Director of National

Account Sales who has applied for long term disability benefits because of aortic valve disease, coronary artery disease and dyslipidemia causing severe shortness of breath, fatigue, weakness, dyspnea on exertion, chest pain, palpitations and depression.

Mr. Cross had a congenital aortic stenosis corrected with a Star Edwards prosthetic valve replacement in 1984. He has a past history of TIA. In 1998, he developed symptomatic' coronary artery disease. On November 11, 1998 he had a PTCA of the distal Right Coronary Artery. On May 17, 2000, he had a PTCA of a 79% stenosis of the OMB of left circumflex coronary artery. There was a residual 40% stenosis of the distal right coronary artery. In February 2003, catheterization revealed high-grade stenosis of the proximal left anterior descending coronary artery and a diagonal branch not amenable to PTCA. February 24, 2003, he underwent a left internal mammary artery (LIMA) implant to the left anterior descending coronary artery with a radial artery jump graft to the diagonal branch.

In the months following surgery, the patient's weight increased from 226 pounds to 262 pounds, a gain of 36 pounds. He initially complained of fatigue. On February, 4, 2004, an Adenosine Stress Test was normal. On March 4, 2004, a Cardiolite Stress Test was negative for exercise-induced ischemia. The patient achieved a peak exertion of 9.4 METS. He companied of dyspnea and chest discomfort at peak exertion. On June 7, 2004 he complained to Dr. Kusnick of fatigue, dyspnea on exertion, chest pains, light headiness, insomnia, and stress at work. On July 26, 2004, he reported that he had walked 1.5 miles in 35-minutes. An echocardiogram on December 12, 2004 revealed mild left ventricular hypertrophy, intact LV systolic function (LVEF 50%) and a normal systolic gradient for a Star Edwards prosthetic valve. On December 15, 2004 A Carotid Artery Duplex Scan revealed a high

grade left subclavian artery stenosis with flow reversal.

On January 14, 2005, Mr. Cross complained to Dr. Jacoby of angina at 200 yards. His weight was 241 pounds. There was a 14 mm-systolic differential between the right and left arms.

Diagnoses:

1. **Coronary Artery Disease**. Mr. Cross had symptomatic stenosis of the right coronary and left circumflex coronary arteries, relieved with. PTCA in 1998 and 2000, respectively. He had stenosis of the left anterior descending coronary artery and diagonal branch bypassed in 2003. The effectiveness of the LIMA to the LAD and the jump graft to the diagonal branch is suspect because of a subclavian artery stenosis proximal to the origin of the internal mammary artery. Overall flow may be further compromised by the pressure gradient across the prosthetic valve. There is no available data on the sensitivity of Cardiolite Stress Testing with this anatomical combination. In the setting of obstructive coronary artery disease, a negative Cardiolite study would be associated with less thar. 1% probability of a coronary event during the following 24 months.
2. **Obesity**. The BMI is 30.25. Obesity and de-conditioning are contributing factors, to dyspnea on exertion and fatigue.
3. **Left Subclavian Artery Stenosis**
3. **Star Edwards Aortic Valve**: The valve has been in place 25 years. The durability of the valve beyond 20 years is not known. As of December 15, 2004, the valve had an expected gradient. The Star Edwards Valves have a relative high risk for embolic injury. Mr. Cross is at risk for embolic CVA. Prophylaxis for embolic events

requires anticoagulation with its attendant risk of bleeding.

4. **Hypertension**: Blood pressure has been well controlled. Hypertension is a risk factor for exacerbation of atherosclerosis.
5. **Dyslipidemia**: As of January 14, 2005, total Cholesterol was 280, with LDL at 207. The NECP recommended goal for individuals with CAD is <240 and <100, respectively. Ongoing dyslipidemia is a risk factor for exacerbation of atherosclerosis.
6. **Metabolic Syndrome**: The combination of obesity, hypertension and dyslipidemia has been identified as high risk for CAD.
7. **Sleep Apnea**: The records do not completely document this diagnosis. Sleep apnea can exacerbate hypertension. Sleep apnea can cause lethal cardiac arrhythmias. Sleep apnea causes daytime fatigue and may be a contributing cause of the patient's symptoms.

Recommendations:

1 Initiate statin therapy and treat to attain NECP goals.
2. Weight reduction to a target weight <= 180 pounds.
3. Treat blood pressure to a targeted level of < 140/90.
4. Subclavian and coronary angiography, subclavian artery angioplasty/stent.
5. Cardiac Rehabilitation for 6 to 12 weeks, with: a) supervised exercise program; b) dietary counseling; and c) behavior modification/stress management.
6. Warfarin therapy to maintain INR 2.5 to 3.5.
7. Sleep study if clinically indicated.

Conclusion:

In my opinion, treatment to date has been appropriate. I would expect recovery after subclavian PTCA to occur within two weeks. Thereafter, the patient will require lifelong treatment for hypertension, dyslipidemia and embolic prophylaxis. Replacement of the Star Edwards valve is not anticipated, but is also not predictable.

The clinical records indicate a functional status NYHA FC II (ches: discomfort walking, 200 yards). Stress testing on March 4, 2004 revealed an average functional capacity for age, with symptoms at peak exercise. The Cardiolite testing indicates a low risk profile for future cardiac events. Therefore, the patient is capable of working at a light occupation, as defined by the U.S. Dept. of Labor, in the Dictionary of Occupational Titles. Without correction of the subclavian stenosis, the work restriction would be permanent.

If I can be of any further assistance in the Peer Review, please do not hesitate to contact me.

Sincerely,

s/ Jeffrey F. Caren

Jeffrey F. Caren, M.D. F.A.C.C.

Diplomate of the American Board of Internal Medicine
Diplomate of the American Board of Internal Medicine, Cardiovascular Diseases
Assistant Clinical Professor of Medicine
David Geffen School of Medicine at UCLA
JFC:go

APPENDIX C:

RELIANCE STANDARD
Life Insurance Company

Disability Claims Department
P.O. Box 8330
Philadelphia, PA 19101-8330
(267) 256-3500
(800) 351-7500
June 16, 2005

Lesesne & Connette
Attorneys at Law
1001 Elizabeth Ave., Suite 1-D
Charlotte, NC 28204

Re: Long Term Disability
Claim Number: 2004 189 069
Policy Number: LSC104498
Your Client: Arthur Cross

Dear Mr. Connette:

We are writing to you regarding the appeal of our decision to deny your client's claim for Long Term Disability (LTD) benefits. Please be advised that Reliance Standard Life Insurance Company ("RSL") strives to treat all claimants fairly and evaluate claims submitted to us in an objective and equitable manner.

Under RSL guidelines Mr. Cross is entitled to an independent review of the claim facts and the determination made regarding his eligibility for benefits. The file was referred to our Quality Review Unit to conduct such a review. This review has been conducted separately from the individual (s) who made the original decision to deny benefits.

We have conducted an independent review of

your client's claim file and have determined that our original decision to deny LTD benefits was appropriate.

Based on the information contained in Mr. Cross's claim file, at the time that his claim was originally denied, it was determined that your client was not eligible for LTD benefits as the information in the claim file did not support a "Total Disability" as defined by the group Policy.

The group policy defines **"TOTAL DISABILITY,"** in relevant part, with respect to **CLASS 2** employees as follows:

"Totally Disabled" and "Total Disability" mean, with respect to CLASS 2, that as a result of an Injury or Sickness:

(1) during the Elimination Period and for the first 24 months for which a Monthly Benefit is payable, an Insured cannot perform the material duties of his/her regular occupation;

(a) "Partially Disabled" and "Partial Disability" mean that as a result of an Injury or Sickness an Insured is capable of performing the material duties of his/her regular occupation on a part-time basis or some of the material duties on a full-time basis. An Insured who is Partially Disabled will be considered Totally Disabled, except during the Elimination Period;

(b) "Residual Disability" means being Partially Disabled during the Elimination Period. Residual Disability will be considered Total Disability; and...

"ELIMINATION PERIOD" means a period of *consecutive* days of Total Disability, as shown on the Schedule of Benefits page, for which no benefit is payable (emphasis added).

Mr. Cross's Elimination Period would have begun on 6/25/04, as it begins on the first date of Total Disability". This means that the group Policy requires your client to be "Totally Disabled" at the time that they ceased working, and throughout the Elimination Period to be entitled to benefits. The Elimination Period under policy LSC104498-2 is 90 consecutive days of "Total Disability". This means that Mr. Cross would have to be "Totally Disabled" at the time that he ceased working, and through 9/23/04 for benefits to be payable.

The medical documentation provided must support evidence of a physical or mental impairment that would warrant limitations and restrictions precluding your client's ability to perform the *material* duties of his occupation.

To determine if Mr. Cross meets the group Policy definition of "Total Disability" with regards to his claimed physical impairment, and to address your request for an appeal on this basis, we have reviewed your correspondence of 3/11, and 3/21/05, all of the information you have submitted on behalf of your client, including a medical examination by Dr. William G. Porter, M.D., along with the information previously contained in Mr. Cross's claim file.

It should be noted that at our request the information in the claim file was reviewed by Jeffrey F. Caren, M.D., F.A.C.C., Diplomate of the American Board of Internal Medicine, and Diplomate of the American Board of Cardiovascular Diseases. Dr. Caren's report will be discussed, in part, in the body of this letter.

In our review of your client's original claim application we note that he documents that his last day of work was 6/25/04 reporting a disability associated with congenital heart disease. He reported that he first became aware of his symptoms in 1960.

Briefly stated, medical records in the claim file document a long-standing history a congenital heart condition that necessitated an aortic valve replacement in 1982. As noted by Dr. Goldstein (reviewing physician in 9/04), "This required chronic anticoagulation therapy, which has been done, and serial echocardiograms (2/14/00 through 3/4/02 studies available) confirm a satisfactory peak and mean gradient, as well as normal left ventricular size and left ventricular ejection fraction. "Mild concentric hypertrophy" first reported on 5/4/94, has also persisted." Dr. Goldstein noted that hypertension was first detected in 4/94, and coronary artery disease was established in 10/98. Medical records document stenting in 1998, and 2000, and coronary artery bypass graft in 2/03.

As you are aware, at the conclusion of his review Dr. Goldstein opined, "I believe these records do support the client's ability to perform a light duty occupation...I see no evidence of any cardiac change in or around June 2004. I would note that on 8/1/01 (Dr. Sotolongo) it was reported, "he is walking...at a pace of about a 15 minute mile," and on 7/20/04, Dr. Kusnick described he "walked 1 1/2 miles in 35 minutes", the latter would approximate to three miles in one hour and this is "physical Conditioning" commensurate with "Category Light 3-5 METS" "occupational" status."

We have reviewed the information you submitted from Dr. Jacoby, Mr. Cross's cardiologist who started treating your client approximately 6 months after he ceased working. Dr. Jacoby documents that Mr. Cross's reported functional limitations would make "meaningful employment difficult." We note a narrative report from Mr. Cross's prior cardiologist, Dr. Kusnick, dated 6/23/04. At that time, Dr. Kusnick advocates permanent disability for your client indicating that he was at "maximum medical rehabilitative state", in spite of the fact that Mr. Cross

documents that he never participated in the cardiac rehabilitation program following his by-pass surgery (as was suggested by Dr. Kusnick , 8/5/03).

We have reviewed the 3/16/05 report from Dr. Porter who reviewed records at your request. Dr. Porter opines, "...based on the probability that continued employment, even in a relatively sedentary occupation, would pose considerable medical risk to Mr. Cross. Job-related stress would make his hypertension more difficult to control, which in turn would hasten the progression of his coronary artery disease and increase the risk of more cerebral infarctions and brain damage." However, actual medical records do not support this theory in that just six months prior to Mr. Cross's work stoppage (while working) his blood pressure was 140/90 while Dr. Jacoby's records note that Mr. Cross's blood pressure readings have remained fairly consistent. Just one week prior to Dr. Porter's report (and 9 months after your client stopped working), Dr. Jacoby's records (3/7/05) document that your client's blood pressure was 142/96.

We have reviewed Dr. Caren's 4/26/05 report of his review of information in the claim file. Dr. Caren opines that to date treatment has been appropriate. Dr. Caren concludes, "The clinical records indicate a functional status NYHA FC II (chest discomfort walking 200 yards). Stress testing on March 4, 2004 revealed an average functional capacity for age, with symptoms at peak exercise. The Cardiolite testing indicates a low risk profile for future cardiac events. Therefore, the patient is capable of working at a light occupation, as defined by the U.S. Dept. of Labor, in the Dictionary of Occupational Titles. Without correction of the subclavian stenosis, the work restriction would be permanent."

As a basis for evaluating the material duties of an individual's regular occupation, RSL utilizes the Dictionary of Occupational Titles (DOT) published by

the Department of Labor as to the material requirement of occupations. In your request for an appeal on behalf of Mr. Cross we have reviewed your client's claim of "Total Disability" utilizing documentation provided in the DOT for this occupation. The position requirements of Director of National Sales were reviewed by a staff vocational specialist. They have determined that the nature and scope of your client's position is best represented by two DOT occupational titles (DOT 260.357-014/light Sales Representative, DOT 163.167-018/sedentary Manager Sales, Therefore, in considering the physical material duties of both of these occupations, Mr. Cross's regular occupation would be performed at the light exertion capacity.

Please be advised that the Policy under which your client was covered was intended to provide a benefit if he was unable to perform the material duties of his occupation. The Policy is not, necessarily, intended to provide a benefit if he is unable to perform the material duties of his job at Diversified Foods, Inc. The difference between an occupation and a job being that an occupation is a vocation or profession as it typically exists in the general labor market whereas a job is a set of specific tasks performed for a specific employer.

We have reviewed your client's statement dated 3/10/05 wherein he relates his medical and work history, and his physical condition. Mr. Cross notes that his occupation is not "sedentary", and we concur as discussed above. Mr. Cross notes that the added management responsibilities created considerably more stress and pressure on a daily basis. In addition to Mr. Cross's description of his job responsibilities he describes his superior's "relentless" expectations. This corresponds with Dr. Kusnick's office notes of 6/7/04 wherein he documents your client's report of severe stress at work. "Up against a very adversarial supervisor". While your client's employer may be

"relentless" and have unrealistic expectations, these factors pertain to your client's particular job at Diversified Foods, Inc. Mr. Cross's claim for benefits was evaluated based upon his ability to perform the material duties of his *occupation*. Stress is a subjective concept and it exists in all aspects of life. The information we have reviewed does not document that your client was incapable of performing the material duties of his *occupation* but rather indicates that he was experiencing an adversarial relationship with his boss. Again this circumstance relates to a specific job situation that Mr. Cross was experiencing at Diversified Foods. Consequently, based on the information in the claim file we have determined that the nature of your client's complaints would not preclude him from performing his *occupation*.

Mr. Cross documents in his statement (3/10/05) that he was seeking "lighter or less stressful positions in the food sales industry, but I had give up finding related occupations because of the deterioration in my health." However, our review of the information in the claim file does not support Mr. Cross's description of the events that took place during the period immediately prior to his work stoppage. Information in the claim file indicates that for several months prior to his work stoppage Mr. Cross was actively job searching in an effort to relocate back to Florida. An e-mail in 4/04 notes that Mr. Cross was applying for a position in regional sales. On 5/12/04, Mr. Cross was communicating by e-mail concerning a position as Regional Manager/National Sales Manager. On 5/28/04 Mr. Cross points out that "I really want to get back to Florida to finish my career." Finally, in an e-mail on 6/3/05 Mr. Cross notes that he was applying for positions as a District Sales Manager, Franchise Operations, Director Sales and Marketing, and Regional Sale Executive. Mr. Cross applied for many of these positions just days prior to his alleged

disability (6/25/04). These positions would hardly invite the theory that your client was attempting to place himself in positions that would be lighter in scope or less stressful as your client alleges. The obvious missing component in this regard would be Mr. Cross's adversarial relationship with his boss. Again, this is specific to his position at Diversified. Food and is not disabling in and of itself.

Records reveal that Mr. Cross did not consult with his cardiologist between 1/21/04 and 6/7/04, and. again between 6/7/04 and 7/26/04 (even though he stopped working on 6/25/04). Therefore, one would conclude that the letter of advocacy for disability written by Dr. Kusnick on 6/23/04 was prompted by your client's visit to his physician on 6/7/04,and that there was a discussion in this regard between Dr. Kusnick his patient. However, on the evening of 6/7/04 (date of Mr. Cross's doctor's visit) Mr. Cross e-mailed his resume for positions in sales and management. Mr. Cross sent his resume to the same individual on 6/22/04 just a day before Dr. Kusnick's letter advocating disability. Mr. Cross's activities in seeking alternative employment in his own occupational field just two days before he ceased working (and one day before his physician advocates permanent disability) does not support your client's 3/10/05 "Declaration" of the circumstances surround his work stoppage.

The group Policy LSC104498-2 contains the following provision in the **BENEFIT PROVISIONS**:

INSURING CLAUSE: We will pay a Monthly Benefit if an Insured:

(1) **is Totally Disabled as the result of a Sickness or Injury covered by this Policy;**
(2) is under the regular care of a Physician;
(3) has completed the Elimination Period; and
(4) **submits satisfactory proof of Total Disability to us.**

(Emphasis Added)

In conclusion, we agree with the Claims Department's decision that your client was not "Totally Disabled" as defined by the group Policy from a physical or mental condition since the date that he ceased working. Information in the claim file reveals that during the final week of his employment Mr. Cross was seeking to relocate to Florida to finish his career and was actively seeking employment in his own occupational filed (sales) at an executive or management level. While he may not have been successful in this endeavor, and was obviously dissatisfied with his boss's management style/demands, Mr. Cross's work stoppage is indicative of a life choice rather than an *inability* to perform the material duties of his *occupation*. When we consider all of the information in the claim file we must agree with Dr. Goldstein and Dr. Caren's assessments in that Mr. Cross is capable of performing full time employment at the light exertion level. As the material requirements of Mr. Cross's regular *occupation* is performed at the light exertion level as classified by the Department of Labor's DOT, your client does not meet the RSL group Policy definition of "Total Disability". In fact, the medical data available documents Mr. Cross's history of long-term symptoms during a time period in which your client was *able* to continue working.

Therefore, the medical records we have reviewed do not support a conclusion that your client was were physically or mentally *incapable* of performing the material duties of his regular light level occupation. As Mr. Cross demonstrated the *ability* to perform the material duties of his regular occupation (and was continuing to seek employment in his own occupational field with a different employer) one would expect the medical records to document a significant deterioration of your client's physical or mental status at or around 6/25/04, if that condition suddenly rendered your client *unable* to work. Consequently, Mr. Cross does not meet

the applicable definition of "Total Disability" and is not eligible for LTD benefits in connection with this claim.

We regret that our decision could not have been more favorable to your client however, we are limited by the information in the claim file and the provisions of the group Policy. Please be advised that our *claim decision is now final; as Mr. Cross has exhausted any administrative remedies available to him under the terms of the Policy.*

Nothing in this letter should be construed as a waiver of any of RSL's rights and defenses under the above captioned policy, and all of these rights and defenses are reserved to the Company, whether or not specifically mentioned herein.

We will, upon specific request and free of charge, provide copies of all documents, records, and/or other information relevant to your client's claim for benefits. We will also, upon specific request and free of charge, provide copies of any internal rule, guideline, protocol or other similar criterion (if any) relied upon in making this determination.

In the event that your client's claim is subject to the Employee Retirement Income Security Act of 1974 ("the Act"), he has the right to bring a civil action under section 502 (a) of the Act following an adverse benefit determination on review. Mr. Cross and his plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact your local U.S. Department of Labor Office and your State insurance regulatory agency.

Sincerely,
Regina Angiolillo,
Senior Benefit Analyst
Quality Review Unit